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# CASES

DECIDED IN THE

## Supreme Court of Ohio

UPON THE CIRCUIT

AND

AT THE SPECIAL SESSIONS IN COLUMBUS

DECEMBER 1823 AND 1824

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REPORTED IN CONFORMITY WITH THE ACT OF ASSEMBLY

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By CHARLES HAMMOND  
ATTORNEY AT LAW

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CASES  
DECIDED BY THE  
Supreme Court of Ohio,  
UPON THE CIRCUIT;

ORDERED TO BE REPORTED BY THE JUDGES.

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*Franklin County, August Term, 1821.*

Before Judges McLean and Hitchcock.

LESSEE OF MOORE v. VANCE.

*Deeds.*

The provision of the ordinance requiring deeds to be attested by two witnesses, repealed from August 1, 1795.

Executed between 1st of August, 1795, and 1st of June, 1805, valid, without any subscribing witness, if acknowledged by the grantor.

Acknowledgment taken by a judge of the territory, in one of the United States, good.

THIS was an action of ejectment brought to recover three hundred acres of land, in the county of Franklin.

The plaintiff exhibited in evidence the copy of a patent from the United States to Jonathan Dayton, bearing date in 1800; a power of attorney from Dayton to E. Bonham, dated March 4, 1806, authorizing the sale of three hundred acres of land to the lessor of the plaintiff, which is the same in controversy; and a deed from Dayton, by his attorney, to Moore, dated April 9, 1806.

The defendant offered in evidence a letter of attorney from Jonathan Dayton to himself, dated August 3, 1802, empowering him to sell four thousand acres, of which the land in controversy is part; a deed from Dayton, by his attorney, Joseph Vance, to his

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Lessee of Moore v. Vance.

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brother, Alexander Vance, for four hundred acres, dated the 2d June, 1803, duly acknowledged and recorded in Franklin county, but *without attesting witnesses*. To the last deed the counsel for plaintiff 2] objected; \*but the objection was overruled and the deed admitted in evidence. The defendant then exhibited a deed from Alexander Vance to himself for the land in dispute, which was dated in 1813, and duly executed, acknowledged, and recorded. The plaintiff then offered to prove that J. C. Symmes, the judge of the territory before whom the acknowledgment of the letter of attorney from Dayton to Vance purported to have been taken, was at the time out of the territory, and therefore had no authority to act in his official capacity; but the court being of opinion that such proof would not avail the plaintiff, overruled the testimony. The plaintiff also offered testimony to establish fraud between Joseph and Alexander Vance, and that the deed was executed to the latter in trust for the former.

The court suffered the plaintiff to prove the declaration of Alexander Vance while he held title to the premises, to show the nature of his claim, and in what right he held the land. The jury returned a verdict for defendant.

The plaintiff moved for a new trial, principally on two grounds.

1. The court erred in admitting the deed from Dayton, by his attorney, Joseph Vance, to Alexander, inasmuch as there were no subscribing witnesses.

2. The court excluded the evidence offered by the plaintiff to show that J. C. Symmes took the acknowledgment of the letter of attorney from Dayton to Vance without his jurisdiction.

J. R. & O. PARISH, and IRVIN, in support of the motion, insisted:

1. That, by the ordinance for the government of the territory northwest of the river Ohio, passed 1787, no conveyance of real estate could be valid, unless "attested by two witnesses," etc. This provision of the ordinance was "to remain in force until the governor and judges should adopt laws," etc. The law adopted by the governor and judges, from the Pennsylvania code, and published at Cincinnati, 1795, does not alter the mode of executing deeds for lands. It is, as it purports to be, "a law establishing a recorder's office," and merely provides how deeds shall be proved before they shall be admitted to record in the territory. It was

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Lessee of Moore v. Vance.

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adopted to be the guide of the *recorder*, and not of the *vendor* and *vendee*. To prevent forged deeds from record, the eighth section enacts that "all deeds, etc., shall be acknowledged by one of the grantors or bargainers, or proved by one or more of the subscribing witnesses, etc., and shall be recorded, etc., within twelve months." If it should be contended that a deed is valid under this law, which is either \*proved or acknowledged, the argument would involve this absurdity, that a deed acknowledged by one of the grantors must be admitted to record without either proof or acknowledgment on the part of the other. If proof or acknowledgment is necessary to give validity to a deed, as to one grantor, no good reason can be given why it should not be equally requisite as to two or more. The policy of the law is to prevent impositions, and clearly requires proof or acknowledgment, before some judicial officer of the territory, before the deed shall be evidence of title in the grantee, or constructive notice to subsequent purchasers for a valuable consideration. If a deed is good without any subscribing witnesses, the acknowledgment, the mere declaration of one grantor, furnishes conclusive evidence against his co-grantors. This would be so contrary to the general rules of law, and so repugnant to every principle of justice, that the court will never give the act such construction, unless required by the most unequivocal and express declaration of the will of the legislature. As the acknowledgment, through abundant caution, was superadded to the attestation required by the ordinance, a declaration of one of the grantors was deemed sufficient *prima facie* evidence against others in the same deed. By adopting this construction, the requisitions of the law may be reconciled to common sense and justice.

But why speak of proving deeds by *one or more* of the subscribing witnesses, if none were necessary to its validity? The governor and judges in adopting this law had evidently in view the ordinance requiring two witnesses to a deed, and they intended merely to save the inconvenience of calling both, and therefore provided that proof by either, or an acknowledgment by one grantor should be sufficient to admit the conveyance to record. The law of 1795 clearly did not dispense with subscribing witnesses; but merely declared the manner of proof. Its terms are as clear as if it had been thus enacted: *two witnesses shall be required to a deed; but proof of its execution may be made by either;*



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Lessee of Moore v. Vance.

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*or one of the grantors may acknowledge it before a judge or justice of the peace of the territory, and this shall dispense with the necessity of proof by either of the subscribing witnesses.* If it had been the intention of the governor and judges, who adopted and published the law of 1795, to alter the provision of the ordinance in respect to the execution of deeds, they would have sought for a law, clear and explicit in its terms, and would not have left a subject of this importance to doubt and construction.

4] \*The law of 1802 is still more vague in its terms than that of 1795. It is a rule that laws relating to the same subject are to be taken together and reconciled, if possible, so as to give every part effect. There is nothing either in the law of 1795, or of 1802, repugnant to the ordinance. The first declares how deeds for the conveyance of land shall be *executed*; the other how they shall be *proved* before they shall be admitted to record. In this construction there is neither repugnance, contradiction, nor absurdity. It leads to no injustice or mischief.

In England, ever since the statute of frauds and perjuries, two witnesses have been required to a deed, and the law in nearly every state in the Union is the same. It is scarcely probable that in an infant settlement, the governor and judges intended to set themselves up as wiser than Congress and the legislatures of the "original states."

The first law of Ohio is explicit upon the subject; and it is a general understanding amongst the bar that there has been no time since the ordinance of 1787 that a deed has been valid without two subscribing witnesses.

2. The proof offered, that the judge took the acknowledgment of the power of attorney without the territory, and without his jurisdiction, ought to have been admitted. A judicial officer has no authority to exercise his powers without his jurisdiction. He has as much right to do one act without his limits as another. If he can take the acknowledgment of a deed, may he not hold to bail, commit for offenses, or sit in judgment upon the lives of men? The law is indeed silent as to the exercise of his powers without his jurisdiction; but reason and policy forbid such implied authority. The case of Jackson, *ex dem*, of Wyckoff v. Humparey, 1 Johns. 498, is an authority in point. To be sure that was *ex parte* proof of the execution of a deed taken in a foreign jurisdiction; but an acknowledgment is tantamount, and the effect precisely the

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Lessee of Moore v. Vance.

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same. They are both *ex parte* proof of the execution; they are both the act of a judicial officer; they are neither of them higher than *prima facie* evidence; and can be repelled by testimony on the other side.

SWAN, BEECHER, and BRUSH, *contra*:

The ordinance of 1787 permitted lands to pass by deed executed in the presence of two attesting witnesses, "provided such conveyances were acknowledged or the execution duly proved," etc. It is clear by the ordinance, \*that a deed attested [5 by two witnesses passed the land with an *acknowledgment*, without proof, or with *proof*, without any acknowledgment. It is also conceded that before the adoption and publication of the law of 1795, no deed passed the land in the territory without two subscribing witnesses. The question turns wholly upon the express or implied repeal of the ordinance, so far as the same respected the execution of deeds. The law of 1795 was passed in Pennsylvania in 1775, and is believed to be still in force in that state, and to be the only one relating to the execution of deeds. It was enacted to prevent the inconvenience and unnecessary strictness required by the act of 1715 (4 Binney, 204). It does, indeed, purport to be "a law establishing the recorder's office;" but the terms of the eighth section are too strong and the intention too obvious to be misunderstood. "All deeds and conveyances which shall be made and executed within this territory, etc., shall be acknowledged by one of the grantors or bargainors, or proved by one or more of the subscribing witnesses to such deed, etc., and shall be recorded, etc., within twelve months," etc. The adoption of this law is most clearly an exercise of the powers given to the governor and judges by the ordinance "to adopt and publish in the district such laws of the original states, both civil and criminal, as might be necessary and best suited to the circumstances of the district." The ordinance vested no express power in the governor and judges to repeal any of its provisions; but, by the most irresistible implication, the mode of executing deeds, pointed out by it, should only be observed "until the governor and judges should adopt laws on the subject" from the original states. The language of the ordinance is: "And until the governor and judges shall adopt laws, etc., estates may be devised or bequeathed by will, etc., and real estates may be conveyed by lease and release, or bar-

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Leasee of Moore v. Vance.

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gain and sale signed, sealed, and delivered by the person of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged or the execution thereof duly proved and be recorded within one year after proper officers, etc., shall be appointed for that purpose."

This law must be taken as a substitute for the ordinance so far as it respects the execution of deeds, and is equivalent to an express repeal of it. Then the deed under consideration must stand or fall by the adopted law of 1795 or the act of the territorial legislature of 1802.

6] \*The law of 1795 contains two distinct modes of executing deeds, either of which renders them valid and effectual in law; the one in the presence of witnesses, and by proof by one or more of such witnesses; the other by an acknowledgment before some judge or justice of the peace, by one of the grantors. This law seems *well suited to the circumstances* of a territory when the population was sparse and when there were but few judges or justices of the peace. Its enactments are therefore in strict accordance with the requisitions of the ordinance. The language of the law is unequivocally in the alternative, and the construction for which the plaintiff contends would render nugatory the statute of Pennsylvania of 1775. It would, indeed, subject parties to all the inconvenience experienced under the law of 1715, to remedy which was the express intention in enacting the one adopted by the governor and judges of the territory.

But the ordinance, as well as the law of 1795, was expressly repealed by the territorial act of 1802. The latter is an "act providing for the acknowledgment and recording of deeds in certain cases;" but in fact provides for all possible cases within or without the territory. The third section contains substantially these words: "And all deeds and conveyances which shall be made within said territory for the conveyance of any lands, tenements, or hereditaments situate within the same, etc., shall be *acknowledged or proved and recorded* within six months from the actual signing or executing said deeds, etc.; and if they shall not be acknowledged or proved and recorded, they shall be deemed fraudulent," etc. The last section repealed all laws and acts of the territory that came within the purview of that act.

The common law required no witness to a deed. The seal was proved *viva voce* in open court. It is difficult to excite a doubt upon

the intention of this law. Before a deed should be evidence, it must *be proved or acknowledged and recorded*. The proof required must be that which the pre-existing laws had made necessary to an instrument under seal; in other words, common law proof. If there were attesting witnesses living, their evidence must be had; if dead, proof of the handwriting; if there were no witnesses, proof of the handwriting of the grantor. Tantamount to such proof is the acknowledgment of the grantor. No argument can elucidate these propositions. This deed, therefore, being acknowledged, answered every requisite of the law, and was properly admitted in evidence to the jury.

\*In addition to the plain meaning of the statute, the people [7 uniformly acted upon this construction. The deeds from 1795 till 1805, when the legislature of the state passed the first law upon the subject, are generally found without subscribing witnesses when an acknowledgment has been taken, and when there has been no acknowledgment, with one or more subscribing witnesses. The general practice was to acknowledge all deeds without subscribing witnesses. Should this practice now be decided to be illegal, it would destroy the titles under the territorial government. The case of *McKean v. Delancey's lessee*, 5 Cranch, 22, shows how strongly courts under similar circumstances lean toward the established practice under a particular statute. The Supreme Court of Pennsylvania, *McFerrin et al. v. Powers et al.*, Serg. & Rawl., have made a similar decision. Infinite mischief would follow from a construction of a law, upon which land titles depend, different from the settled custom of the people.

The practice shows a contemporary construction of the law, and the court ought accordingly to decide, unless the practice should be found manifestly against the true construction of the law.

2. The counsel for the plaintiff maintain that a new trial should be granted, because the court rejected testimony tending to show that Symmes, judge of the territory, took the acknowledgment of the letter of attorney from Dayton to Joseph Vance, in New Jersey, without his jurisdiction. They rely principally upon the case of *Jackson, ex dem. of Wyckoff, v. Humphreys*, 1 Johns. 498. We contend that this was not law before nor since the time it was made. It is against the settled law since the time of Chief Justice Pratt. 8 Mod. 323. "The court held that a plaintiff who was in Holland might make affidavit there and get it attested by a pub-

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Lessee of Moore v. Vance.

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lic notary; and that it should be admitted as evidence to hold the defendant to bail here." It is very certain that a party making a false affidavit in Holland, could not be indicted for perjury in England; and it is also very certain that if the act was "void," a defendant would not have been held to bail under it.

In the case of *Omedly v. Newell*, 8 East, 364, the authorities are all brought together, and it was adjudged that an affidavit made by an American citizen in Paris under the laws of France, was not "void," but sufficient to hold to bail in England.

It would be very novel should our courts give more faith and credit to a *foreign officer* and a *foreign jurisdiction*, than to one of our own, known to our laws and acting under their authority. In the 8] \*case before cited, Lord Ellenborough thus expresses himself: "It does not appear that any difference exists, in point of reason or law, between holding to bail, as it is practiced in the more frequent instances of affidavits in Ireland and Scotland, and of affidavits made abroad out of his majesty's dominions." Nor was the reason valid, that the party making affidavit in Canada could not be indicted for perjury. The court is not, in such case, without means of punishing the party who should attempt to impose upon them a false and fraudulent voucher of the kind. It appears from the last case cited, that although he could not be indicted for perjury, he would be answerable and punishable for a misdemeanor.

There is a case in 3 Bos. & Pul. 57, exactly in point for the defendants. A fine was allowed to pass upon the affidavit of the commissioners, for taking the acknowledgment of the party in France made before an English magistrate then in France. 2 Bun. 655; 7 Term Rep. 315; 2 Strange, 1200.

In the case of *Welch v. Hill*, 2 Johns. 373, and of *Hopkins v. Mendenback*, 5 Johns. 234, the Supreme Court of the State of New York has overruled the case of *Jackson v. Humphreys*. But the reason of the latter case does not apply to the one under consideration. Would not a judge of a territory of the United States, who should knowingly take the acknowledgment of a forged or fraudulent deed, be equally liable to impeachment, whether the act was done *within* or *without* his juridical limits? The party himself who should be guilty of such imposition, would be liable to the court for a fraudulent device.

Judge Symmes was an officer known to the people of the territory and recognized by the public laws of the United States.

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Lessee of Moore v. Vance.

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He had express authority to take the acknowledgment of deeds within the territory. It can not be denied that a citizen of New Jersey could have come within the Territory, and before one of its officers make a valid acknowledgment of a deed. The case would have been widely different had the officer of the territory attempted to take an acknowledgment of a deed in New Jersey to pass lands in that state. But he was a judge of the territory: he had authority by law to take the acknowledgment of deeds for lands situate within it; and this was a personal, and not a local authority. It was in the nature of a general commission which follows the person, and not that of a judicial authority which is limited to juridical jurisdiction.

\*Opinion of the court by Judge HITCHCOCK. [9

The plaintiff's counsel insist upon a new trial upon two grounds.

1. That the deed from Dayton to Alexander Vance having no attesting witnesses, was not valid to pass the land under the then existing laws of the territory, and ought not to have been admitted in evidence.

2. That the court rejected evidence tending to show that the letter of attorney from Dayton to Joseph Vance was acknowledged by a judge of the territory northwest of the river Ohio without his jurisdiction.

If the counsel for the plaintiff be correct upon either ground, a new trial must be granted.

When the question was first presented, the court entertained strong doubts of the validity of the deed from Dayton to Alexander Vance. The first question presented to us is, whether the ordinance of Congress of 1787 was virtually repealed by the adopted law of 1795 and of the territorial legislature of 1802. It is very clear from the ordinance, that two witnesses are required to a deed for the conveyance of lands, and three to a will, and that these provisions remained in force until the governor and judges adopted a law upon the subject from one of the "original states." In 1795 the governor and judges of the territory adopted the law of Pennsylvania, passed in 1775, upon the subject of the "execution, proof, acknowledgment, and record of deeds." The statute is entitled "a law establishing a recorder's office;" but the eighth section expressly provides for the execution of deeds within the territory.

The first section enacts "that there shall be a recorder's office."

The second declares the effect of the word "grant," etc.

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*Lessee of Moore v. Vance.*

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The third punishes the forgery of acknowledgments, etc.

The fourth and fifth provide for entering satisfaction of mortgages, and a penalty against the mortgagor who shall neglect to comply with the act.

The sixth and seventh point out how recorders shall be appointed, etc.

The eighth, which is the material one under consideration, enacts "that all deeds and conveyances which shall be made within this territory, of or concerning any lands, tenements, or hereditaments therein, or whereby the same may be in any wise affected, in law or equity, shall be acknowledged by one of the grantors or bargainors, or proved by one or more of the subscribing witnesses to such deed, before one of the judges of the General Court, or before one of the \*justices of the Court of Common Pleas, where the lands conveyed do lie, and shall be recorded in the recorder's office where such lands or hereditaments are lying and being, within twelve months after the execution of such deeds or conveyances," etc.

From the moment this law was adopted and published, the force of the ordinance ceased, and the law became itself the rule as to the execution, acknowledgment, and proof of deeds conveying lands in the territory. Had this law remained silent as to the execution, proof, and acknowledgment of deeds, and only established a recorder's office and regulated his duties, a deed would have been void without an attestation by two witnesses; but it is a well settled rule that when a law enacts a thing to be done different from the same thing required by a former law, the first thereby becomes repealed without any direct expression of such intention by the law-making power. It surely was never intended that the ordinance of 1787 and the statute under consideration should have a concurrent efficacy. Upon general principles of universal law an old statute gives place to a new one. 1 Blac. C. 89. But it is scarcely necessary to enter into a minute discussion of the provisions of the law of 1795, as the territorial act of 1802 repealed all laws and acts coming within its purview. The third section of this act differs little from the eighth section of that of 1795, except its terms are more broad and comprehensive. The latter clause in the third section is in these words: "And all deeds and conveyances, which shall be made and executed within this territory, for the conveyance of any lands, tenements, or hereditaments situate

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Lessee of Moore v. Vance.

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within the same, whereby such lands, tenements, or hereditaments shall be conveyed, affected, or incumbered, shall be acknowledged or proved and recorded."

It would be difficult, if not impossible, to express an alternative in more unequivocal terms. We are of opinion that both proof and acknowledgment of a deed, to make it a valid conveyance, are not necessary, and that by the *terms* of the act, *either* would be sufficient to admit the deed to record. The general terms of the statute, by the repeal of the law of 1795, either left the proof to the common law, the *jus gentium*, or the repealing clause did not extend to the mode prescribed by the former act. If the latter construction be correct, which is not admitted, the proof must be made by "one or more of the subscribing witnesses." The court is inclined to consider the eighth section of the law of 1795 as coming within the purview of the act of 1802. It is, however, not deemed necessary to settle the construction of this part of the statute, as the subject is not directly before the court.

\*If to give the deed validity no proof by subscribing witnesses was necessary, it would seem naturally to follow that the act under consideration intended to dispense with their attestation; for it would be an idle and empty form to require an attestation without also requiring proof. It can not be denied, that an exemplification of a deed, legally executed and admitted to record, is good evidence in all cases; nor do the counsel for plaintiff press very strongly the proposition that under the laws of the territory of 1802, a deed could not be admitted to record until it was proved by one or more of the subscribing witnesses, *and* acknowledged. The language of the act is too clear to be misunderstood. Now admitting that at any time after the publication of the law of 1795 until the year 1805, in order to admit a domestic deed to record, it was only necessary to have it acknowledged by the grantor before the proper officer without any proof; and also that an exemplification from the records was good evidence for the grantor: it would seem to be a plain consequence that an attestation would be form without substance, a ceremony without utility. The appearance of names could never lessen the dangers of perjury; nor would they be any protection against fraudulent or clandestine conveyances. Following the construction of the court, the statutes have guarded with sufficient vigilance real estate in the territory. To the ordinary evidence of contract, the signature



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Lessee of Moore v. Vance.

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and seal of the party and persons that may be present at its execution, is superadded the certificate of a sworn officer of the territory, that the grantor acknowledged in his presence the instrument to be his deed.

But it is said, in order to give validity to deeds of conveyance, almost every state in the Union requires the act to be done in the presence of witnesses who must attest their execution. It will be admitted that every sovereignty has right to prescribe rules to regulate the transfer of property with respect to real estates; the object of the statutes seems to be, to give solemnity and notoriety to the transaction, and to preserve the evidence of it. This is evident from the ceremonies observed at the feudal investiture down to the present mode of requiring attestation and acknowledgment. At first our ancestors deemed feudal donations sufficiently formal and notorious by livery of seisin without deed. 1 Coke on Litt. 490; 2 Fonb. 33. The next mode for conveying lands was by deed sealed and delivered. Neither signature nor subscribing witnesses were required until the reign of Edward IV. After that time the parties began to write their names over or near the seal. 12] 2 Bla. 308, note. \*In the reign of Henry VIII. they are signed by the parties, but not by the witnesses; but in the next reign the practice commenced for witnesses to subscribe their names. When the law-makers in this country speak of a deed it must be taken in a technical sense, as understood at common law; that is, a writing sealed and delivered by the parties. Should the legislature merely declare that lands should pass by deed, the court would have no hesitation in saying, that neither attestation nor acknowledgment would be necessary. To preserve the evidence of the transaction and give it solemnity, the legislature might require attestation and acknowledgment, or they might dispense with one or either of them.

It appears to the court, on carefully comparing the laws of 1795 and 1802, with the ordinance of Congress of 1787, that the former virtually repealed the latter, so far as respects the execution, proof, and acknowledgment of deeds; that an acknowledgment before the proper officer superseded the necessity of calling attesting witnesses; and that the deed under consideration was legally admitted to record, and operated as notice to the lessor of the plaintiff, who purchased subsequently and therefore took nothing by his deed.

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If doubts existed as to the construction, we should pause before we should make a decision against a practice which is admitted to be uniform from the publication of the law of 1795, until altered by an act of the general assembly of this state in 1805. It would create irremediable mischief to disturb the settled custom of the territory as to the evidence of title; nor would the court do it, unless it was manifestly founded upon an erroneous construction of the laws in force. The provisions of a statute ought to receive such reasonable construction, if the words and subject matter will admit of it, as that the existing rights of the public or of individuals be not infringed. 2 Mass. 146. It is also a rule that they be so construed that no man who is innocent shall be endangered. 1 Inst. 611. These liberal maxims seem fully recognized by the Supreme Court of the United States, in the case of *McKeen v. Delancey's lessee*. Chief Justice Marshall, in delivering the opinion of the court, says, "In construing a statute of a state on which land titles depend, infinite mischief would ensue should this court observe a different rule from that which had long been established in the state." The court are, therefore, of opinion that upon the first point the plaintiff is not entitled to a new trial.

2. But the counsel of the plaintiff insist that the court erred in rejecting testimony tending to show that the officer before whom \*the letter of attorney from Dayton to J. Vance purported [13 to be acknowledged, was out of the territory at the time, and that the acknowledgment is consequently void; and they rely upon the case of *Jackson, ex dem. Wyckoff, v. Humphreys*, 1 Johns. 498. It might well be questioned whether the testimony, if admitted, would have availed the plaintiff; but it is the province of the jury to decide upon the effect of testimony—of the court the question of competency.

The principal reason which appears to have governed the court in that decision was, that the oath administered in Canada, by an officer of that state, was extrajudicial and void, and the witness could not be indicted for perjury in case he swore false. This reason is not applicable to the case under consideration. Judge Symmes was not entirely in a foreign jurisdiction. He was an officer of the United States; and it might admit of doubt, whether, if the fact assumed had been conclusively proved, the act of acknowledgment would not have been completely valid. It does not, however seem necessarily to follow that because the witness

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could not be indicted for perjury, that therefore the oath was of no validity; for it is clear from the case cited from 8 East, 322, that although the witness could not be indicted for perjury he could be made answerable for a misdemeanor, and therefore the oath was neither "extrajudicial," nor "void." This court pays great respect to the cases adjudged by the Supreme Court of New York; but when by chance we find one against the current of authorities, we must pause before we adopt it as settled law. We find, by two subsequent adjudications of the same court, the case of *Jackson v. Humphreys* substantially overruled, and we are rather inclined to adopt the latter decisions. The court think the last adjudged cases are more liberal and consonant to reason; for it would be strange, indeed, for a court to give more credit to a foreign officer and an alien than one of our own citizens, clothed with authority by our own laws. It would require no ordinary effort to reconcile these decisions.

Independent of this, that was matter of proof in which might be involved a serious question under the criminal laws of New York; here no such question can possibly arise. It is presumed that a judge taking the acknowledgment of a deed for fraudulent purposes or knowing it to be forged, within his particular jurisdiction, or another state, would, in either case, subject himself to the same punishment; and it is equally certain that one who, by fraudulent devices or forgery, should procure an acknowledgment, whether *in or out of the territory*, would be equally liable to punishment.

14] \*There appears some force in the remark, that a judge empowered to take the acknowledgment of deeds rather acts as a general commissioner of the law than in a judicial capacity; and that this is an authority which accompanies his person and is not limited and confined to juridical jurisdiction. Be this as it may, we are inclined to the opinion that one of the judges of the United States empowered by law to take the acknowledgment of deeds conveying lands, may, in any part of the Union, take such acknowledgments, not to affect lands in a foreign jurisdiction, but in the territory over which his powers extend.

Let judgment be entered on the verdict:

## HUTCHESON v. HEIRS OF McNUTT.

*Chancery.*

Contract in writing, executed by one party only, stipulating to convey part of certain lands, the other party "being at one-half the expense, in land or otherwise, for procuring a title to the same," payment of the expenses held a condition precedent, and to be paid as they were incurred, or right perfected.

The party omitting to pay the expenses according to agreement, can not, after a lapse of years, be aided in equity against the forfeiture.

A proposition to convey, upon receiving the proportion of the expenses, not complied with by immediate payment, no waiver of the forfeiture.

THIS case was decided by Judges Pease and Burnet, in Madison county, July, 1823. The whole case is set out in the opinion by Judge Burnet. No arguments of counsel were furnished.

The complainant sets out in his bill, that in December, 1799, James McNutt, since deceased, executed an instrument of writing under his hand and seal, in the following words: "Be it remembered, that I, James McNutt, of Madison county, and State of Kentucky, do covenant and agree with John Hutcheson, of the county of Monroe, and State of Virginia, to make over and convey to the said Hutcheson, his heirs, or assigns, the one-half of the land that I shall obtain in virtue of my contract with Charles Arbuckle, heir at law of Matthias Arbuckle, deceased, on a military warrant for four thousand acres, obtained by the said Hutcheson for the representatives of Matthew Arbuckle, deceased, on the said Hutcheson being at one-half the expense, in land or otherwise, for procuring a title for the four thousand acres, to which agreement I bind myself, and heirs, firmly by these presents. Sealed with my seal, and dated this 23d day of December, 1799." The bill also states, that in July, 1800, \*the said James McNutt caused the said [15 warrant to be located on four tracts, of one thousand acres each, on Darby creek. That afterward, to wit, in October, 1801, the said Arbuckle and McNutt made a division of the said tracts of land, in pursuance of their contract, by which the said McNutt received two tracts, containing together fifteen hundred and fifty

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acres, as his share. That afterward, in July, 1806, the complainant, by his agent, called on McNutt, requested a conveyance of half the said land, and offered to pay him the one-half of any necessary expenses he had been at. That McNutt hath obtained patents for the said land, in his own name, and hath refused to convey the moiety thereof to the complainant.

The bill also charges, that in July, 1801, the said James McNutt passed his obligation to the complainant, to make him a clear and sufficient deed to two hundred acres of land, in the Northwestern Territory, in that part laid off for the officers and soldiers of the Virginia line—that the land should be of the second quality—that the title should be made as soon as grants could be obtained, but that this contract was on the express condition, that if the warrant of James Thompson for 2,666 66-100 acres, which had been assigned by the complainant to Henry Banks, should be completely put in the possession of, and secured to the said Thompson, the contract was to be binding, otherwise to be void. The bill further states, that the said warrant was obtained from H. Banks, and put into the possession of McNutt, and that grants had been obtained for the land. That the said James McNutt died in 1809, and that the defendants are his heirs at law. The complainant prays for a specific performance, and for general relief.

The defendants, by their answer, admit that their father James McNutt, executed the contracts of December, 1799, and July, 1801; that the lands were located, divided, and partitioned, as is stated in the bill; but they allege that under the contract of 1799, the complainant did not advance the moiety of the expenses, and that under the contract of 1801, he did not procure the warrant of Thompson, and secure the same, as he was bound to do.

It appears from the testimony and exhibits, that in October, 1801, McNutt wrote to the complainant, advising him of what he had done—stating the amount of his expenses in procuring the title to Arbuckle's land, and complaining that the warrant of Thompson had not been obtained. That in September, 1802, he wrote to complainant, stating an estimate of his expenses—that there would [16] \*be five hundred and fifty acres coming to complainant when he paid the half of the expenses, and urging him to send him money, as he was in need. It appears that the complainant took no notice of these communications, but suffered the matter to sleep till 1806, when he sent his son to demand a conveyance, and

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tender a moiety of the expenses. That McNutt, at that time refused to receive the money, or make the conveyance. That all the expenses of locating and procuring a title to the land, on Arbuckle's warrant, had been advanced by McNutt. That he had also paid the taxes from 1800 to 1806: and it does not appear that complainant has at any time paid to McNutt, or to any other person, a single cent on account of this land. It also appears that on the division between Arbuckle and McNutt, in October, 1801, the former gave the latter fifty acres and fifty dollars for the choice of tracts. That the complainant did not sign either of the contracts, or enter into any other obligation binding him to a performance. It also appears, that the warrant mentioned in the contract of 1801, was obtained by the exertions and at the expense of Thompson and McNutt. That the complainant refunded to Thompson the money expended by him. That McNutt in 1802 recognized the claim on this contract, soliciting a remuneration for his trouble and expense. That the warrants mentioned in this contract have been located, and the lands patented.

The claim of the complainant to a specific execution of these several contracts will be considered separately.

The first question presented on the contract of December, 1799, is whether the payment of a moiety of the expenses be not a condition precedent.

McNutt covenanted to convey to Hutcheson the one-half of the lands, "on the said Hutcheson being at one-half of the expense." It is said that the participle, doing, performing, etc., prefixed to a covenant, renders it a mutual covenant, 2 H. Black. 1315; but when the covenant goes to the whole consideration, on both sides (as it does in the case before us), it is a condition precedent. 1 Fonb. 382. This contract was not signed by both parties, so as to give mutual remedies. It is the contract of McNutt alone. Should the defendants therefore execute the conveyance before the payment of the money, they are left without recourse; but not so with the complainant, who, by paying his money in pursuance of the contract, perfects his right to call for a conveyance. Equity will always respect the intention of the parties, rather than the literal meaning of their words. The design in this case must have been, \*that the complainant should pay the money, as the meritorious [17 cause of the conveyance; otherwise, as the complainant is under no promise or contract to pay, the defendants might be required to

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part from the land without the possibility of receiving the money. 1 Stra. 571. The case of *Pordage v. Cole*, 1 Saund. 320, is in confirmation of this doctrine; for although the plaintiff, in that case, had judgment, it was on the ground that both parties had sealed the contract, and had mutual remedies against each other; but the court observed that it might have been otherwise, if the specialty had been the words of the defendant only, and not the words of both parties, by way of agreement. A time also had been fixed for payment, which is a circumstance entitled to weight, and is stated, in a note to that authority, as the principal ground of the judgment. A reference to the natural order of the transactions, as to time, which form the substance of this contract, will show that the payment must be a condition precedent. When the contract was made the warrant had not been located; the fee of the land was in government, and consequently it was necessary that an entry and a survey should be made, and a patent obtained. These preparatory steps were to be taken before the complainant could have a right to demand a deed; but these steps could not be taken without incurring the expense which the complainant was to pay. This payment, then, was necessarily to precede the conveyance, and until the complainant saw proper to meet it, he voluntarily, by his own laches, rendered it impossible for McNutt to execute a conveyance, as then McNutt could not pass a title until he obtained a patent, and as the patent could not be obtained without the payment of the expense, that payment was unavoidably to precede the conveyance, and must be a condition precedent.

In the case of *Jones v. Barkley*, Doug. 691, it is said by Lord Mansfield, that the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedence must depend on the order of time, in which the intent of the transaction requires their performance.

The application of this rule to the case in hand is manifest. The expense of procuring the title must, in the nature of things, arise, before the title is secured; and until this be done, McNutt can be under no obligation to convey.

The cases of *Thorp v. Thorp*, 12 Mod. 455; *Duke of St. Albans v. Shore*, H. Black. 270, and *Goodison v. Nunn*, 4 Term, 761, throw 18] \*much light on this question, and will be found to support the principle contended for. In the last case Lord Mansfield says, the

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determinations in the old cases, on this subject, outrage common sense, and that he is glad to find they have been overruled; that it would be absurd to say the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person.

Another question arising on this contract is, whether Hutcheson was not bound to advance his part of the expenses as they accrued, and whether, by neglecting to do so, he has not put it out of his power to perform the condition on his part. The nature of the transaction itself appears to be decisive on this point. McNutt, by his contract with Arbuckle, was to have a moiety of the land that should be obtained on a certain warrant; he was to locate the warrant, obtain the patent, and defray the half of the expense. He then entered into the contract we are now considering, by which he agreed to convey half the land he might receive on his former contract to Hutcheson, provided he would be at half the expense of procuring the title. No part of this expense was to go into the pocket of McNutt. It was to be paid out to others, and it forms the whole consideration of the contract. The only benefit which McNutt could receive from this arrangement, was to be relieved from the inconvenience of raising the money that would be required to meet the expense, and for this, and this alone, he agreed to give up half the land.

It appears that the whole expense was less than one hundred dollars, which bore no comparison to the value of the property; consequently McNutt stipulated for no consideration that can be considered as a price for the land. He agreed to give it to the complainant without receiving a cent for his own use. The only possible benefit, therefore, that McNutt could receive from the arrangement, was the aid of Hutcheson, in advancing the money that would be necessary in securing the title. If, therefore, he can be left to provide the whole amount of this expense, he may lose the only advantage that could have induced him to enter into the contract; he may be left to encounter all the difficulty and inconvenience which he seems to have been desirous of getting rid of, and to be relieved from which, formed the only motive that could have induced him to make the contract. The true consideration, then, must have been the convenience of this advance, to secure which it was necessary to furnish the money as the expenses arose; for \*by leaving McNutt to make the advance, he must suffer the [19



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very evil from which the contract was intended to relieve him ; and having once suffered it, he has lost the only benefit which he intended to secure. Had it been perfectly convenient for McNutt to make the advance, he would be chargeable with gross folly for stipulating as he has done, and equally so if he intended nothing more than to have the expenses refunded at some future day, as it might be convenient to Hutcheson.

From this view of the subject we are driven to the conclusion, that the consideration of this engagement was, not that Hutcheson should merely be accountable for these expenses, but that he should meet them as they might arise, so as to save McNutt from the inconvenience of an advance. The time of payment, therefore, is of the essence of the contract, and can not be dispensed with ; for we have seen that the consideration does not consist principally in the amount to be paid, which is admitted to be a mere trifle, in comparison with the value of the property, but in the time of payment.

Inasmuch, therefore, as the complainant did not advance the money, as he was bound to do, in consequence of which McNutt has been compelled to make the advance, and has thereby incurred all the inconvenience from which the contract was designed to relieve him, it has become impossible, in the nature of things, for the complainant to perform the condition or render to the defendants a satisfaction.

It is also a circumstance entitled to much weight, that this contract is not mutual. It is obligatory on McNutt, but not on Hutcheson. He was under no obligation to pay the money, or accept the land, but was at liberty to claim or abandon it at his pleasure. There ought, therefore, to be some period fixed for the determination of his will, otherwise he might keep the defendants in suspense indefinitely, and prevent them from improving or disposing of the property. It would be inconvenient and unequal for one party to be thus bound, while the other was at perfect liberty ; and yet this consequence results unavoidably from any other construction than that which has been given, for if the complainant were not bound to make his election by advancing the money when the expenses accrued, there is no time fixed by the contract for the payment, and he may keep the defendants in suspense during his pleasure. This is the unavoidable consequence of an admission that the condition, on the part of Hutcheson, can be performed

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after the expenses have been incurred and paid by McNutt. This view of the subject leads \*us to the same conclusion, that [20 the payment is a condition precedent, and must be made at the time contemplated by the parties, and that if it be not so made, the money can not be afterward paid, so as to save the condition.

In the case of *Purkhurst v. Van Corland*, 1 Johns. Ch. 282, Chancellor Kent recognizes the doctrine, that a court of equity will never decree performance where the remedy is not mutual, or one party is only bound by the agreement. This distinguished judge lays down the same principle in the case of *Benedict v. Lynch*, Ib. 373, and refers to 2 Vern. 415; 1 School and Lefroy, 13; Bunb. 111; 5 Esp. 240; 11 Vessey, 592, as settling the point.

Another view may be taken of this contract, calculated to strengthen the conclusion already drawn.

McNutt covenants to convey to Hutcheson, "on the said Hutcheson being at half the expense." How can he be at half the expense, unless he pays the money as the expense accrues? Paying a particular claim is one thing, and refunding the amount to him who may have paid it, is another. Suppose McNutt had been destitute of money, and the person to whom the expenses were to accrue, refused to give credit, in consequence of which the title could not be perfected, would the complainant, in that case, have a right to exact performance from McNutt, or recover damages for his inability to perform? The answer must be in the negative, and only one reason can be given in support of it, viz: that Hutcheson having refused to perform the condition, on the performance of which McNutt had covenanted to convey, and having thereby rendered a performance impossible, would have forfeited his right to the contract and released McNutt from the obligation of his covenant. If this consequence would result from the inability of McNutt to meet the expenses, and the consequent loss of the land, it must be difficult to assign a reason why Hutcheson should be saved from this legal consequence of his laches, because McNutt or some other person was compelled to perform the condition in his stead. If the advance of this money was so much of an object to McNutt, as to induce him to make the contract in the first instance, we may presume that the same object might induce him, or that necessity might compel him to give a similar advantage to some other person, for the purpose of securing the land. Suppose this to have been the case, on what principle of justice or equity could Hutcheson, by

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offering to refund, exact the remaining moiety of the land. So far as his rights are involved, it certainly makes no difference whether 21] \*the land was lost to all the parties, for want of money to secure the title, or whether necessity required McNutt, on the failure of Hutcheson, to make a similar contract with some other person, or to suffer the inconvenience of raising the money himself. In either case he must have lost the entire consideration of his contract, and must necessarily be discharged from its obligation. Admitting, then, as the fact is, that McNutt advanced the whole expense, and thereby secured the title, Hutcheson can claim no merit on that account—his right is as completely lost as it would have been had the whole land been forfeited to Arbuckle by his failure. The merits of another can not be transferred to him; his claim must be supported by his own performance or fall by his laches.

The next question that arises is, whether this be a case that will authorize a court of chancery to relieve the complainant from the forfeiture incurred by his default.

It is said that in all cases of penalty, or forfeiture, equity will relieve, if compensation can be made, and the default be only in time. The true ground of relief in such cases, is to be found in the intention of the parties. Where, from the nature of the agreement, the penalty is only intended as a security that the consideration shall be performed, a court of equity may relieve, for notwithstanding they do so, they give the party that which he stipulated to receive, and therefore no injury is done; but where the relief would destroy the substance of the contract, as if the thing stipulated be a collateral act, relief can not be granted, for no precise value can be affixed to such an act. In the case before us, the condition was the performance of an act to third persons, and the inconvenience resulting from the non-performance can not be determined, and of course there is no criterion for fixing a compensation. The disappointment might have forced McNutt to a sacrifice equal to the then value of the land. Many cases are found in the books, in which parties have been relieved from the consequences of not performing their covenants at the precise time stipulated; but they are cases in which performance could be done in conformity with the undertaking, and the parties sustained no injury thereby, and even in these cases the rule on which relief is granted has been very much narrowed. Newland on Contracts, 242; 4 Bro. 494; 4 Ves. 667, 686; 5 Ves. 720, 818; 13 Ves. 224.

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The true doctrine appears to be, that a person who demands a specific performance, must show that he has been in no default, unless he can account for it by special circumstances; and if through \*his own negligence he can not perform the whole on his side, [22 he can not compel the other side to a performance, because such performance would not be mutual. And for the same reason, when a man has trifled, or shown a backwardness on his part, equity will not decree a specific performance in his favor, especially if circumstances are altered. 1 Fonb. 384. In the case before us there has been a gross default unaccounted for. The complainant has trifled, the condition can not now be performed, and circumstances are materially altered. The truth of this will appear by a simple reference to dates, and to the change that has taken place, in the circumstances and value of the property. The contract was made in 1799—the expenses were incurred in 1800. The complainant took no step, but remained wholly inactive till 1806, although informed of the amount of the expenses as early as 1802; and the land has increased in value, probably tenfold.

But may we not arrive at a satisfactory solution of this question by attending to the nature and extent of the condition on the part of Hutcheson. He was to be at half the expense of procuring the title. The term expense as used in this contract, ought not to be limited to the money disbursed, but should embrace the time, attention and labor, required to accomplish the object, for as these things were necessary, and are of value, they ought to be classed under the head of expenses. The title could not be secured without them, and in point of value they no doubt exceeded the amount of money paid. Hutcheson performed none of these acts, nor did he procure any other person to perform them. It is at this time impossible for him to perform them, and it is equally impossible to • assess their value. How, then, can he be entitled to relief.

Having disposed of the questions that arise on the contract, we come to those that are presented by the testimony. And first, do the letters of McNutt waive the laches of the complainant, and entitle him to the prayer of his bill.

In the letter of October, 1801, he states the division of the land between Arbuckle and himself, describes the quality of it, and informs complainant that he has paid the fees and taxes, amounting to nearly forty dollars. In the letter of September, 1802, he informs the complainant that he had sent the receipts for the survey-

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ing and office fees, and for one year's tax. That there would be five hundred and fifty acres coming to the complainant, when he should pay his part of the expense; he makes an estimate of the expense, and in the close he expresses a hope that the complainant will send him some money, as he is in want.

23] \*From these letters it appears that in October, 1801, complainant was informed of the expense—that in September, 1802, the same information was repeated, coupled with a request to send the money, and an admission that on doing so there would be five hundred and fifty acres coming to him.

As these letters were written after the warrant had been located, and the laches of the complainant had taken place, it becomes necessary to inquire, what impression they ought to make on the case. In the first place, it is more than probable that McNutt was ignorant of the true and legal construction of his contract, and that the admission was made under a mistake, arising from an ignorance of his right. We should be warranted in drawing this conclusion, from the tenor of the letters, and from the after conversation with the witness, J. Hutcheson. But if it were to be admitted, that the letters were written with a full knowledge of the true construction of the contract, and that it was the express intention of the writer to waive the laches, and to convey the land on receipt of the money, it would not vary the case, because the letter called for an immediate payment, and held out no offer of further credit. It was, therefore, the duty of Hutcheson to pay the money without further delay, and particularly so, as at the date of these letters it had been advanced more than two years. In 5 Ves. 720, Lord Kenyon is represented as saying, that "a party can not call on a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt, and eager;" but it appears that Hutcheson took no notice of these letters till July, 1806, when he sent his son to demand the deed. This vexatious and unreasonable delay is wholly unaccounted for, and manifests a disposition to trifle with the subject, to a degree that can not be countenanced. The complainant seems to have consulted nothing but his own convenience; he has shown a backwardness that can not be overlooked. When these circumstances are connected with the fact, that the complainant was never bound, either by the contract or the letter, but was at liberty to claim or disclaim, at his pleasure, it seems impossible to resist the conclusion, that he

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has forfeited any right that might have been set up under the letter. If he could lie still from that time till the year 1806, what limit are we to fix to his negligence? Holding in his hand the right to accept or reject the contract at his pleasure, and knowing that McNutt was in great need of the money, he withholds his election, keeping the other party in suspense, till he finds the land had risen in value fifteen hundred \*dollars, or more, then he [24 comes forward and demands a conveyance for the trifling consideration of thirty or forty dollars. At this time the property, in the hands of the present holder, is estimated at many thousand dollars. The claim is certainly unreasonable, and one that no court of equity can, or ought to sustain.

The claim of the complainant to a specific performance on the contract, without the letters, or on the letter considered as a waiver of laches, and a revival of the contract, will be fully met and rebutted by the doctrine in *Benedict v. Lynch*, 1 Johns. Ch. 372. In that case the learned chancellor lays it down as an acknowledged rule in courts of chancery, that when the party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification for his delay, and when there is nothing in the acts or conduct of the other party that amounts to an acquiescence in that delay, the court will not compel a specific performance. He adds, that in the case before him the purchaser had paid nothing, but suffered defaults to accumulate from year to year, as if he had forgotten that he was under any obligation to pay, and that if the land had not risen in value, there was no reason to believe that the plaintiff would ever have attempted to raise the money. In that case the last installment was not due when the plaintiff tendered the whole purchase money, and filed his bill, yet the chancellor declared there was a gross negligence on the part of the plaintiff, that took away his claim to assistance.

In the case before this court, the default is much more striking—is wholly unaccounted for, and has not been acquiesced in; for should the letter of 1812 be considered as a waiver of the former laches, it was on the condition of immediate payment, and no inference can be drawn from it in favor of a delay, yet the plaintiff rested till 1806, and thereby incurred a greater default

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than had taken place before the letter was written, or than existed in the case just referred to.

Another question arising from the testimony is, whether the act of the complainant, in taking the warrant out of the office and inclosing it to McNutt, can vary the case. It certainly can not, because in the first place it was done before the contract was made, and formed no part of the consideration ; and secondly, because it was attended with no expense, and the labor was so inconsiderable that no pecuniary value can be affixed to it.

The next and last question which the evidence presents on this 25] \*branch of the case, is, whether the complainant can claim anything in consequence of the payment of the fifty dollars by Arbuckle for the privilege of his choice of tracts.

It will be recollected that this transaction took place in October, 1801, more than a year after the forfeiture of the contract, and almost a year before the letter of September, 1802, was written. A moment's reflection, therefore, will show that it can not affect the case.

It is not necessary to notice the conversation, in January, 1806, between the witness, Isaac Hutcheson, and McNutt, as it amounts to nothing more than a proposition for a compromise, without acknowledging any right in the complainant or any obligation on McNutt. On the contrary, it denies the existence of such a right. A man may offer to buy peace on any terms, and shall not afterwards be held to his proposition if it be rejected at the time.

On the whole, it appears manifestly that the complainant is not entitled to a specific performance of the contract of December, 1799, and that that contract ought to be delivered up and canceled.

Our attention will now be directed to the contract made in July, 1801. We have seen that this contract was for the conveyance of two hundred acres of land, on this express condition, that a certain warrant therein described should be put in the possession of, and secured to James Thompson or his heirs ; but if this should not be done, that the contract should be void and of no effect. The complaint alleges in this bill, that the warrant was procured by him, and put into the possession of Thompson ; but from his own testimony it appears that the allegation is not literally true. As evidence on this point, he has relied on the letters of McNutt and Stewart, which state very clearly that the warrant was obtained by

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the labor, and at the expense of McNutt and Thompson, and that the complainant paid the bill of Thompson's expenses after the warrant had been obtained. The same fact is clearly deduced from the deposition of Stewart, also relied on by the complainant. If his right, therefore, to a performance of this contract, were to depend entirely on his own performance of the condition, he would unquestionably fail; but as McNutt and Thompson have both acquiesced in the failure, and have called on the plaintiff for the money expended by Thompson, and as in consequence of this acquiescence and demand he paid the money in 1802, and by so doing actually performed what the parties consented to receive as a substitute for a literal performance, it would seem from the doctrine in the cases above referred to, that neither McNutt nor his heirs can now avail themselves of a technical breach. It is a circumstance or weight, that there was neither backwardness nor delay on the part of Hutcheson after the proposition of 1802, but that he promptly paid the money which the parties had agreed to accept as a commutation for a literal performance.

The defendants have offered the deposition of Henry Banks, to whom the warrant had been assigned, by Hutcheson, and in whose hands it was when this contract was entered into. The object of this testimony was to show, that although Thompson has been put in possession of the warrant, it has not been secured to him or his heirs, agreeably to the letter of the contract. The witness states that the warrant in question was sent by him to Cuthbert Banks of Lexington, by whom it was handed over to Thompson, on an agreement that he should have it located, without prejudice to the claims of the witness, and that whatever right, if any, the witness might have acquired, by the assignment of Hutcheson, should be secured to him. It does not appear that Hutcheson had an interest in the warrant, or an authority to sell it, and it would seem from the deposition, that Mr. Banks did not place much confidence in the goodness of his title, for one of the reasons which induced him to send the warrant to C. Banks, was to procure an assignment from Thompson, who, it appears, refused to make an assignment, and denied the power of Hutcheson to sell. But it is not necessary here to investigate, or settle the right of Henry Banks, nor would it be proper to do so. It is enough to know, that Thompson was put in possession of the warrant—that he, or his assignees, are in the peaceable enjoyment of the land, and that no claim has been set up against it, or against him



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or his heirs, on account of it for more than twenty years. Nothing, therefore, can be gathered from the testimony that can destroy the right of the complainant, under the contract of 1801. But as it is a rule recognized in all courts of equity, that he who asks for equity shall do equity, and as in consequence of the negligence of the complainant, McNutt has been put to trouble and cost, for which he has received no remuneration, it is both just and reasonable that the amount of this claim should be ascertained and paid before the defendants are required to execute a conveyance. As the contract calls for no particular tract of land, but for two hundred acres of second-rate land, within the tract set apart for the officers and soldiers of the Virginia line, or continental establishment, the defendants are at liberty to designate any tract, of the quality described, within that district, of which their father, James McNutt, died 27] \*seized, and to which it is in their power to make such a conveyance as is required by the contract; but if there be no such land within their power, and assets have come to their hands sufficient for the purpose, let them procure the land, or pay to the complainant the value.

A reference ought to be made to the master commissioner, to ascertain and report the value of the trouble and cost of McNutt, to be paid by the complainant, and whether the defendants can make a good title to two hundred acres of land, such as is described in the contract; and if not, and assets have come to their hands, sufficient for the purpose, what sum they ought to pay as the value thereof, and all further directions stayed till the coming in of the report.

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*Delaware County, May Term, 1822.*

Before Judges McLean and Burnet.

LESSEE OF N. PATRICK v. GIDEON OOSTEROUT.

Lands sold upon execution must be valued, and the valuers must be sworn, or the sale is void.

THE lessee of the plaintiff claimed under a sheriff's deed. In the year 1815, Norman Patrick obtained a judgment in the court

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of common pleas, against Oosterout, and took out execution, which was levied on one hundred acres of land belonging to the defendant. The sheriff returned an appraisement which did not identify the land in any other manner than by stating the same to be "one hundred acres of land where G. Oosterout livcd." It did not appear by the appraisement that the freeholders were sworn.

Two questions were submitted to the court: *First*. Is it necessary under a sheriff's deed to exhibit the appraisement? *Second*. Is the return of the appraisement sufficient?

L. & C. COWLES, for plaintiff:

The judgment, execution, and sheriff's deed are all that is necessary to establish the right of the plaintiff to a recovery. The appraisement is a part of the sheriff's return which ought to be taken advantage of, if at all, at the return term of the execution. 1 *Ld. Ray*, M. 346. The court could then correct the appraisement before the money should be applied to the discharge of the execution, and place the plaintiff, defendant, and \*purchaser, in *statu quo*. The purchaser has no day in court to examine the correctness of the proceedings: the law presumes that every officer does his duty, until the contrary appears. The purchaser is to presume in favor of the jurisdiction of the court, as well as the legality of the acts of its ministerial officers.

It is understood to be the practice of the Circuit Court of the United States, not to listen to objections to appraisements after the return term of the execution. This practice adds to the security of all parties. It should be the policy of the court to render sales under the sheriff as certain as possible; otherwise real estate would never sell, or be sacrificed. No person would purchase at sheriff's sale if he supposed his title depended upon a perpetuation of every ministerial slip of the officer; or if it did, it would be at a price proportioned to such hazard. This would operate equally unjust for the creditor and debtor. The desperate speculator alone would be benefited. As the statute makes it the duty of the appraisers to be sworn, or of the sheriff to have them sworn, it is a fair presumption of law that the duty was performed. In the case of *Charles H. Atherton v. J. Jones*, *Adam's R. M. H.* 363, the court decided that the creditor himself, who was a justice of the peace, might administer the oath to the appraisers, and in the case of *Porter et al. v. Bean*, *Sar.* 362; 7 *Mass.* 371, it was also adjudged that the attorney

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of the creditor was competent to swear the appraisers. These were both actions of ejectment, or writs of entry in the nature of ejectment. These authorities at least show that the courts will not listen to every trifling exception to appraisements.

SWAN, for defendant.

There can be but two ways of divesting a man of his estate: first, by his own act and consent; and second, by act and operation of law. The law which divests a man of his fee in favor of his creditor, is of modern invention, and in many respects operates severely upon the debtor. As money appears to be only a representative of personal property, this, and many other states in the Union, in giving the creditor power over estates, have placed barriers in the way to its total sacrifice, by a sudden exposure to sale. In Massachusetts, New Hampshire, and perhaps other states in the Union; the estate of the judgment debtor is set off to the creditor by the sheriff and three reputable freeholders, under oath, subject, however, to redemption within a year. Before the creditor in this state can be divested of his fee by law, there must not only be a *judgment and execution*, but the "officer levying such execution 29? \*shall call an inquest of five reputable freeholders, and the inquest shall, on oath or affirmation, return to said officer, under their hands and seals, an estimate of the real value of such estate," etc. 14 L. O. 175, sec. 11. "Provided, that no tract of land shall be sold for less than two-thirds of the returned value of the inquest." If the defendant has been divested of his estate, it has been by virtue of this statute.

1. The appraisalment does not identify any land.

2. The appraisers were never sworn.

The appraisers, from anything that appears from the return, never made any "actual view" of the premises. Nor can it be ascertained whether the land appraised was the tract levied upon and sold. It would be easy, if this appraisalment is sufficient, to defeat the legislature's intention, by levying upon a tract of land and causing another to be viewed and valued which might not be worth a tenth part of the one offered for sale. This appraisalment will apply equally to any cause in any other court. If good in this case it will supersede the necessity of ever having another between the same parties. The officer's levy must be certain. If necessary he may take with him a surveyor. It is the duty of the

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appraisers to make actual view of the premises thus levied upon, and if there should be any difficulty in ascertaining the boundaries of the tract, they may also take to their assistance a surveyor; it is indeed their duty to do so to prevent injuries to the parties.

But the second point is clear. Courts may as well dispense with the oath of jurors as appraisers. The law is no more plain and peremptory in the one case than the other. Dispense with the certainty of the land, and with the oath of the appraisers, and it would be useless to preserve the other provisions of the statute. The *amount*, the *view*, the *seal*, and *return* itself, might follow without further injury. In the case of *Selden v. Goodwin*, 1 Day, 312, it was held that a decree of probate, ordering a sale of lands, furnished no legal evidence that an inventory had been made.

It has also been held by the same court that in order to make out a title to land, by the levy of an execution, it must be shown that the appraisers were disinterested freeholders, and that they *were sworn according to law*. 1 Day, 109.

When a purchaser claims under a special authority, it is his duty to show that the delegated powers have been strictly pursued. If one acting under a power of attorney, had general authority to sell the estates of his principal, provided he had them first appraised *\*by five freeholders under oath*, and the same were sold for [30 two-thirds of such valuation, would it not be incumbent upon a purchaser to show that the agent strictly pursued his authority? It would seem too absurd to draw a negative conclusion. Chief Justice Marshall has laid down the true rule in these cases. 4 Cranch, 403. His words are: "It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor." "He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted." "It is true that full evidence of every minute circumstance, especially at a distant day, ought not to be required." In this case we ask not for *minute circumstances*: we ask for a compliance substantially with the statute. We maintain that the legislature intended that an appraisement should be a solemn act under oath, and that a judgment debtor should not be divested of his estate without that preliminary solemnity.

By the Court.

The question presented in this case is an important one, as it may involve property to a large amount; but we are not at liberty to dispense with a legislative provision, whatever may be the consequence of enforcing it. It is our duty to inquire what the law is in this, as in every other case, and having ascertained it, we can not turn to the right hand or to the left. The inconvenience or hardship of the case we can not remedy, however we may regret it. The defendant's counsel have placed the question on its true ground, that a man can not be legally deprived of his estate unless the provisions of the law by which it is taken are substantially pursued. The objection to the plaintiff's title is, that the appraisers were not sworn. It is contended that this was a necessary step in the proceedings, and that it ought to have been returned by the officer.

The statute puts it beyond all doubt that the "inquest shall return on oath or affirmation to the sheriff," etc. The officer can not be said to have caused an appraisement to be made unless the oath has been administered and a certificate of the fact accompanies the return. From the statute it would seem that the ministerial act of the sheriff ceases, so far as it respects the appraisers, when he has assembled them. It does not appear to be any part of his duty, by the law under consideration, to swear or affirm the inquisitors, or to cause it to be done. It would be a fair construction of the law, that the appraisers themselves should take an oath 31] before some judicial \*officer, and whether the same should be certified by the person who administered it or by the appraisers, this court would deem immaterial. Such seems to have been the decision in the case of *Atherton v. Jones*, cited by the bar. The court there, in speaking of the mode of making return of the appraisement, as it regards the oath of the inquest, say: "It is true he may return it [the justice's certificate], but we think he may also return it in substance." "That he has done in this case, and such a course is warranted here both by precedent and practice." We accord with the opinion expressed by the court of New Hampshire. The court ought not to require evidence of every minute circumstance, from the execution to the sheriff's deed; but they can not dispense with the substantial requisitions of the statute. Amongst these undoubtedly the oath of the appraisers is not the least important. The duties of the appraisers are not merely min-

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isterial; they have the stamp and character of judicial proceedings, and those too of vital importance to the community. The appraisement of real property, in a state like ours, before it can be subjected to sale for the discharge of debts, is highly beneficial, not only for the security of debtors, but of creditors also. This is not a question of policy merely: it is one, however, upon which the court may, and in some cases must, exercise a sound discretion. But in the absence of testimony we are now called upon to presume that the appraisers made their return upon oath. Might not the court, with equally legal propriety, dispense with the appraisement altogether? Might we not as well presume, on the exhibition of a sheriff's deed, that there has been a judgment and an execution? Under our statute a sale, without any appraisement, would be clearly void. The authority to transfer the fee by operation of law, is a mere statutory provision. This authority, in Ohio, is limited and conditional. 1. The estate must be appraised on oath. 2. It must sell for two-thirds of the appraised value. These are conditions which must appear to the court to have been complied with before they have any authority to ratify a sale.

It is insisted that the party injured is not without remedy. It is said he may sue the sheriff and recover all that has been lost by the officer's negligence or misfeasance. With this question we have no concern in the present case, but admitting an action would lie against the sheriff because the appraisers did not make their return on oath, the remedy would be frequently inadequate. The court, however, are of opinion that the sheriff has no control over the appraisers. He appoints them, indeed, but it is not his duty to swear them or cause it to be done, nor does there appear to [32] be any authority given him by law to coerce them into a performance of duty. But be this as it may, a power limited and conditional must be carefully pursued. Some things may be presumed in favor of a purchaser; but he must see that the authority under which he purchases has been substantially pursued. The vendor must have authority to sell, or the purchaser takes nothing.

It is not necessary in this particular case to decide whether this defect in the return of the appraisement might be supplied by parol evidence. The counsel for the plaintiff suggested at last term, that he would endeavor to procure such testimony. None such has been offered, and we are informed that none exists. Hard as the case may appear on the part of the purchaser who has paid

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his money, the law constrains us to say he can take nothing by his purchase. We are of opinion that the appraisement constitutes an essential part of the proceedings in the sale of lands under an execution, and unless the appraisers are sworn, the appraisement is void.

Let the judgment be entered upon the verdict.

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*Clark County, April Term, 1822.*

Before Judges McLean and Burnet.

**BUTTLES v. CARLTON AND OTHERS.**

Defendant in custody within the prison limits makes oath that he is unable to support himself. Plaintiff not bound to furnish lodgings.

It was an action of debt upon a prison rules bond, and came before the court upon a case stated as follows: The defendant, Carlton, was in custody upon a *ca. sa.* at the suit of the plaintiff, and executed the bond upon which the suit was brought, for remaining in custody within the rules of the prison—and upon its being approved of by two justices, as required by law, Carlton was admitted the prison rules. Being thus within the prison rules, he made affidavit that he was unable to support himself in prison, a copy of which was served upon the plaintiff's agent. Carlton claimed that the plaintiff was bound to supply him, not only with 33] provision, but with lodgings \*also. The agent proffered to furnish meat and drink; the prisoner insisted upon a bed also, which he frequently called for and was refused. Considering that the refusal of a bed was a refusal to furnish *support* according to the statute, Carlton went out of the prison rules? And the action is brought to charge him and his securities.

Opinion by Judge BURNET.

Two questions have been submitted in the argument of this case. First, was the defendant, Carlton, entitled to support after he was relieved from close confinement, and admitted to the privilege of

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the bounds? Secondly, if entitled to support, was he to be furnished with bedding at the expense of the plaintiff?

On the first question we are of opinion that the prison bounds, established by the court of common pleas in pursuance of the statute, are to be considered as an extension of the four walls of the prison, and that while the prisoner is within these limits, he is to every legal intent a prisoner, and as such entitled to claim the support given by the 12th section of the act for the relief of insolvent debtors. It is true that the bond is in the name of the plaintiff, but it is delivered to the sheriff, and the condition of it is, "that the prisoner shall continue safely in the custody of the jailer, within the limits of the prison bounds." This language, we apprehend, can not be mistaken. It represents the obligor as a prisoner, in the custody of the jailer, within the limits; and if a prisoner, he may take the oath prescribed, and thereby charge the plaintiff with his support. The language of the law is, "that when a person imprisoned for debt, either on mesne process, or on *capias ad satisfaciendum*, shall be unable to support himself in prison, and having made oath to that effect," etc., "the plaintiff shall stand chargeable," etc. The only inquiry then is, was the defendant, Carlton, imprisoned for debt? If he was, he was entitled to support; and if that support was not afforded, he had a right to leave the prison bounds, or in the language of the law, "to be immediately set at liberty." We are clearly of opinion, that he was a person imprisoned for debt within the meaning of the statute, and that he had a right to take the oath. This is the only inference to be drawn from the statute, or from the bond, by which he is to continue safely a prisoner in the custody of the jailer. While he so continues, he must, *ex vi termini*, be imprisoned, and consequently be entitled to claim the support allowed by the statute.

\*It is certainly natural to suppose, that a person enjoying the [34] privileges of the limits would, in ordinary cases, be able to provide for his own support; but this is not always the case, as where poverty is connected with sickness, or other personal disability. The construction contended for would leave such persons to perish, or procure subsistence from the hand of charity. Such could not have been the intention of the legislature: it must have been their design to provide for persons so circumstanced, whether on the limits or in close confinement.

On the second question, we are of opinion that the plaintiff was



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not bound to furnish the defendant with lodgings. This conclusion seems to follow from the determination of the former question. As that pre-supposes him to be a prisoner, in the custody of the jailer, he must be entitled to his lodgings within the prison. This privilege the jailer can not deny him, as the prison is provided at the expense of the county, for the reception and accommodation of all persons committed by legal authority. As a person in custody on final process, after he has obtained the privilege of the limits, is bound to continue a true prisoner in the custody of the jailer, it would seem to follow that he does not lose the right of lodging within the jail. On the contrary, the spirit of the provision would rather require that all persons within the limits should return at night to the prison, as their common lodging-place, though we do not mean to say that the practice which has heretofore prevailed in this respect should be altered. In many cases it is an indulgence of great value, to permit persons on the limits to lodge without the prison, and the feelings of humanity must suppress every desire to deny, or curtail that indulgence. All we mean to say is, that they have a right to repair to the jail as their common lodging-place. The case in hand requires us to go no further, and we feel no disposition to do so.

In the formation of these statutes, the rights of creditors have not been overlooked, nor can the court disregard them in any construction which it may be necessary for them to give. The words of the statute, subjecting the creditor to the support of his debtor, are, "he shall stand chargeable with his support." In construing these words, we are not disposed to go beyond their import, and most, certainly they can not require the plaintiff to provide that which has been already provided. The county has furnished lodgings; it was not therefore necessary for the plaintiff to provide them, and we can not believe that the legislature intended to 35] impose on him an \*unnecessary burden. In construing these words, we must look to the situation of the prisoner, and to the wants and privations that attend it. Food and lodging seem to be embraced in the term *support*, and we should have no hesitation in saying, that they were both chargeable on the plaintiff, had neither of them been provided by law; but as lodging has been provided, it would be implicating the prudence of the legislature, and imposing an unnecessary burden on the plaintiff to give that

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construction to the term. What the law has provided, the plaintiff can not be required to provide.

It is the opinion of the court, that the plaintiff was bound only to make an arrangement with the jailer to furnish the plaintiff regularly with his food, and having done so in this instance, he provided all the support he was chargeable with by the statute; consequently, the defendant left the prison bounds in his own wrong, and the plaintiff must be entitled to judgment.

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BANK OF MOUNT PLEASANT v. ADMINISTRATORS OF ROBERT POLLOCK,  
WHO WAS SPECIAL BAIL OF JOSEPH MCKAUGHEY.

Special bail not liable where principal dies after the return of the *ca. sa. non est*, and before the return of first *sci. fa.* executed, or second *nihil*.

THE plaintiffs in this case had obtained a judgment against Joseph McKaughey, in the common pleas of Belmont county. They sued out a *capias ad satisfaciendum*, upon which the sheriff returned not found. They then sued out a *scire facias* against Robert Pollock, which was returned nihil; and a second *scire facias* was sued out, and returned executed. Robert Pollock appeared at the return of the second *scire facias*, and pleaded, that after the return of the *ca. sa.* "not found," and before the return of the first *sci. fa.* "nihil," Joseph McKaughey departed this life. To this plea the plaintiffs demurred. Robert Pollock deceased before the demurrer was argued, and his administrators appeared and were made defendants.

The cause was argued in the common pleas of Belmont by Beebe for the plaintiffs, and Hammond for the defendants. Judgment was given upon the demurrer for the defendants, and the plaintiffs appealed to the Supreme Court.

\*It was again argued in the Supreme Court, at October, [36 1823, before Judges Pease and Sherman, by the same counsel. The court was asked by Mr. Beebe, on the part of the plaintiffs, to reserve the case for decision at Columbus, but they were of opinion that it was unnecessary.

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By the Court.

Our statute declares that the bail shall be discharged by surrendering the principal upon the return of the first *scire facias* "*executed*," or the second "*nihil*." This is the rule of the English courts. It is, however, one principle of this rule, as established in England, that if the principal die after the return of the *ca. sa. non est*, the bail is charged. It is maintained for the plaintiffs, that as the legislature has adopted, in substance, the English rule as to the period at which a surrender shall discharge the bail, they have adopted that rule in all its parts—so that if the principal die after the return of the *ca. sa. non est*, the bail can not be exonerated. The court are of a different opinion. The statute gives to special bail the absolute right to be discharged, upon the surrender of the principal, at either of the periods specified. The death of the principal can not prejudice this right. The bail do not undertake for the life of the principal; but for his surrender if alive. They are discharged by his death. The limitation of the English rule is not adopted by the legislature, and the court have no authority to insert it by interpretation.

Judgment for the defendant.

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THOMAS ORR v. BANK OF THE UNITED STATES, WILLIAM CREIGHTON,  
AND WALTER DUNN.

Corporation not liable to be sued in an action of assault and battery; can not be joined in such action with other defendants. When so joined, writ is abatable as to all.

THIS cause was argued before all the judges in Ross county, at December term, 1821, by King and Atkinson for the plaintiff, and W. K. Bond for the defendants. The case is fully stated in the opinion of the court by Judge Burnet.

KING and ATKINSON for plaintiff:

Two questions grow out of the demurrers in these cases. 1. Whether, if a corporation and individuals be joined together in  
37] trespass, the *individuals* can take \*advantage of such joinder,

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admitting the corporation is not liable in trespass. 2. Whether a corporation is liable to be sued in trespass. The law is clearly settled as to the first question, however it may stand as to the last. The law read by the opposite counsel on the trial, from 1 Chit. 75, to wit, "that if several persons be made defendants jointly, where the tort could not in point of law be joint, that they may demur," etc., is not denied. It is good law, but does not apply to this case. It applies *only* to torts, which, from their *nature*, can only be committed by *one person*, and can not be committed by several *jointly*, as verbal slander. This is the case put in 2 Saunders, 117, O. n., cited by Chit. The reason of this law is obvious. One of several defendants only *can be* guilty in such case, and it can not appear from the declaration *which* it is.

The tort that we complain of is one where several persons, in point of law, may be jointly guilty; and the joinder of more or less persons than may be guilty or liable, constitutes no objection. 1 Chit. 75.

There are, however, three cases cited in 16 East, 10, *precisely* in point, where the objection was taken and overruled.

If in England, as in New York, where they have adopted the English practice, any objection could be raised on account of the *different processes* requisite to compel an *appearance*, that objection can not be taken here in the State of Ohio. See 18 Jud. Acts, 364, sec. 14. The English and New York practice of entering an *appearance* is unknown to us. We have the same process to bring both into court. The judgment is the same, and final process against both the same, except that a *capias* and a *ca. sa.* here, as well as in England, could not issue against a corporation to *any effect*. It would be a singular kind of logic that would authorize the conclusion, that because a party could not make use of one *as well as the other* of the two kinds of mesne process provided by law, he has no right to any one of them.

The first question, then, it is believed, must be with the plaintiff, and the demurrer overruled as to Creighton and Dunn.

On the second question, it may be observed, in the first place, that from the nature of it we could not reasonably expect to find many decisions precisely in point. Corporations are few in number compared with individuals. We ought rather to be surprised that we find so much law on the subject. If similar injuries have been committed in England by corporations, the remedy against any and

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all the *members* being so clear, and the obstacles arising from their  
 38] \*process so great, it could hardly be expected that a single  
 case of trespass against a corporation could be found in their books.

The fundamental principles and settled maxims of the law ought  
 always to be kept in view and applied in settling legal questions,  
 and this especially when but few direct adjudications on the sub-  
 ject are to be found.

Every right is said to have a remedy, and every injury should be  
 redressed by those who occasion it.

These rules are applicable to all *natural* persons, and if *artificial*  
 persons come not within their reach in every case, the *exception*  
 ought to be clearly shown, as well as the *reason* upon which the  
 exception is founded.

If a master bid his servant do a trespass, and he does it, the  
 master, as well as the servant, is liable, upon the maxim of law,  
 that he who does a thing by another, does it himself. There is also  
 another reason why the law holds him liable, namely, that the per-  
 son actually committing the injury, may not be a responsible per-  
 son, and adequate redress can not be obtained from him alone.

So great a regard has the law for the preservation of the "rights  
 of persons," that it considers every one a principal, who has, in any  
 way, been concerned in bringing about an injury to them. The  
 anxiety of the law to redress such injuries, is manifest, also, in giv-  
 ing a remedy which is not subject to the embarrassments incident  
 to pleadings in other cases; for whether *less* or *more* than are liable,  
 are joined in the suit, no advantage, to delay the redress sought,  
 can be taken on that account.

With these preliminary observations, I will proceed, first, to ex-  
 amine very briefly the authorities relied on by defendant's counsel.

Mr. Chitty, 1 Chit. 66, says: "Corporations may be sued in that  
 character in many instances for damages arising from neglect of a  
 duty imposed on them by particular statutes, but they can not in  
 general be sued in that character in trespass or replevin, and the  
 action must be brought against each person who committed the tort  
 by name;" and cites 8 East, 229, 230, which was an action of eject-  
 ment against two persons *as bailiffs* of a corporation. It was said  
 by Lawrence, Judge, that "trespass does not lie against a corpora-  
 tion." On this case it may be observed:

1. That no such question arose in the case, or was decided by it.

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What the judge said, therefore, was a mere casual *dictum*, and not at all called for by the case.

2. The court *did* decide, that the action could not be maintained \*against the bailiffs *as such*, because *their* possession *as such* [39 was the possession of the corporation, which was *virtually* deciding that the action should have been brought against the corporation.

3. It was contended by defendant's counsel in that case, that the action should have been against the corporation.

The two authorities next cited by Chitty, I have not been able to find, and can therefore make no comments on them.

He next cites Vin. Ab. Corp. K. pl. 22, which says: "A corporation can not commit a trespass but by their writing under their seal." Broke, 34, is cited, and Ib. P. pl. 2. "Per Throp.—Trespass does not lie against commonalty, but shall be brought *against the persons by their proper names*; for *capias* nor *exigent* lies against commonalty." Cited from Broke. Ib. 2, 15. "Trespass does not lie against a corporation, viz: by the name of corporation, but against the persons who did it, by their proper names; for *capias* nor *exigent* does not lie against commonalty." Cited from Broke, 43. Bacon Ab. is also cited, but nothing material can be found in it. The last authority cited by Chitty is 1 East, 555, which was an action *on the case* by a member of a corporation against the other members, for depriving him of a corporate privilege. The corporation had authority to hold a court, called a water court, and at one of its sittings disfranchised the plaintiff. The King's Bench decided that the water court had erred in their judgment, and to maintain the action against the members, it was necessary to prove *malice*. The decision was a correct one, for the injury complained of arose from a *judicial error*. The marginal note of this case does not present the case decided. The case has no bearing on the case under consideration, as the *quo animo* is of no consequence in trespass. 1 Chit. 129, 130; 6 Bac. Ab. G, 589, last ed.

It is also said in Comyn's Digest, Franchise F. 19, that "process of outlawry does not lie against a corporation aggregate, and *therefore* trespass does not lie against a corporation, but against the particular persons only; for a *capias* and *exigent* do not go against a corporation." Broke, 43, is cited.

I have been thus particular in quoting *at length* the authorities referred to by Chitty because the *reason* upon which the law laid down in them is founded, is *also* stated. It should be particularly

remarked, that all the authorities above referred to, which have any bearing on the case, *ground* the law laid down in them upon two reasons *only*. 1. Because a *capias* and exigent do not lie against a corporation. 2. Because a corporation can only commit a trespass by their writing under their common seal.

40] \*In considering the first question in this case, we have shown that the first reason arising from *process* has ceased to exist, at least in the State of Ohio. When the *reason* of the law ceases, the law itself ceases.

As to the second reason, if it is a good one at this day, it would be enough to show, *on the trial*, that the defendants did, by their writing, etc., commit the trespass. And it does not properly become a question in the present stage of the case, because it certainly could not be necessary so to allege the fact *in the declaration*, if it were necessary to prove it on the trial. But if such ever were the law in England, modern decisions show that such is not the law now, either there or in this country.

It is a notorious fact, without referring to any decisions, that corporations now-a-days make little or no use of their seals, unless it be in such cases where the law requires it of *individuals*. *Formerly* a corporation was held liable in no case of contract, unless their seal could be shown against it. It seems, however, to be the policy of the law latterly and the inclination of courts, to consider them as possessing almost the *same capacities* and the *same facilities* in the transaction of their business that any *natural* person exercises. 12 Johns. 227; 14 Johns. 119; 7 Cranch, 297. The case in 12 Johns. is an important one throughout.

Corporations are treated in equity as natural persons are, and subject to the same rules. Ejectment lies *for* and *against* them, which supposes that they may be trespassed upon, and that they may trespass upon others. And that a corporation is answerable, *in their corporate capacity*, for a trespass, is not only *reasonable*, but well supported by the cases in 16 East, 6; 7 Mass. 169, and the principles decided in the cases above cited.

Every reason to be drawn from analogy, and the fundamental rules and maxims of law and equity, bear equally hard, *in principle*, against a corporation as against an individual; and there is no reason, rule, or maxim, either in law or equity, which claims for them an exemption. The objection arising from *process* does not apply here in this state, if it does anywhere, at this day; and that

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arising from the necessity of a corporation doing a tort under, etc., has become obsolete. 1 Bac. 11; Abatement in Torts, 36, 12, 621; Eliz. 143; 1 Bac. 30.

The argument on the other side was not furnished to the reporter.

\*Opinion of the court by Judge BURNET, delivered December term, 1822. [41]

This is an action for an assault and battery, and false imprisonment. The declaration is filed in the common form, charging the defendants jointly with the commission of the trespass, as though they were all natural persons. The defendants have demurred generally. On the argument two principal questions were raised and discussed.

1. Whether a corporation aggregate is liable to be sued by its corporate name, in an action of trespass for an assault and battery, and false imprisonment.

2. Whether, if they be not so liable, the defendants, Creighton and Dunn, can take advantage of the joinder on this demurrer.

On the first question, Chitty has been cited, 1 vol. 66, where he says, corporations may be sued in that character, in many instances, for damages arising from neglect of duty imposed on them by particular statutes, but they can not, in general, be sued in that character, in trespass, or replevin. The action must be brought against each person by name, who commits the tort.

In 8 East, 230, Lawrence, Justice, says, trespass does not lie against a corporation. Thorp, Justice, says, trespass does not lie against a corporation aggregate by its corporate name, for a *capias* and *exigent* do not lie against it. 22 Ass. 67. A corporation can not beat nor be beaten, nor commit treason, or felony, nor be outlawed, etc. 21 Edw. 4, 7, 12, 27, 67. They can not be assigned, 1 Bac. Ab. 507; nor outlawed, 10 Co. 32; nor attached, Ray. 152. No replevin lies against them by the name of their corporations, Brownl. 175. They can not be declared against in custody. 6 Mod. 183. They are not indictable, though the particular members are. 12 Mod. 559. They can not sue as a common informer. 2 Stra. 1241. For torts they must be sued individually. Salk. 192. Trespass does not lie against a corporation, but against its members. 4 Com. Franchise F. 19.



A corporation can not commit a trespass but by their writing under their seal. Vin. Ab. Cap. K. 22. Trespass does not lie against commonalty, but shall be against the persons, by their proper names, for *capias* and *exigent* lie not against commonalty. Ib. P. 2. Trespass does not lie against a corporation, viz: by the name of corporation, but against the persons who did it, by their proper names, for *capias* and *exigent* do not lie. Ib. 2, 15. As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them, for a *capias* and *exigent* do not 42] go. 2 Sell. 149; \*2 Imp. 675; Bro. Corp. 43. A corporation can neither maintain, nor be made defendant to an action of battery, or such like personal injuries, for a corporation can neither beat, nor be beaten, in a body politic. 1 Blac. Com. 503. It appears also that the civil law ordains (in conformity with this rule) that for the misbehavior of a body corporate, the directors only shall be answerable in their personal capacities. Wooddison, in his lecture on corporations, 1 vol. 494, is very clear and explicit on the subject. He says, "It is incident to all bodies politic, to sue and be sued, by their name of incorporation, but it is manifest that this must be restricted to particular actions; thus corporations can neither be plaintiffs nor defendants in actions of assault and battery."

The case in 12 Johns. 227, cited by the plaintiff, shows that the law in relation to the liability of corporations, is so changed by the course of modern decisions, that they are now held responsible on promises, express or implied, and that *assumpsit* may be maintained against them on such promises. But because the law has been changed in relation to contracts, it does not follow that it is also changed in relation to torts, so as to render a corporation liable, generally, to actions of trespass, or for other torts, by persons not belonging to the body corporate, at least without showing that they were done by an authority from them, granted in pursuance of their charter. In short, the only question decided in that case was, that a corporation may make a valid contract, not under seal; and this point being settled, there was no incongruity or falsity apparent in the declaration, and therefore the court very properly decided that they would not stop and inquire, in that stage of the proceedings, whether the contract was made in such manner, or by such persons as to be binding on the defendants. The objection in that case was taken on the broad ground that *assumpsits* will

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not lie, under any circumstances, against a corporation, but the court, having shown very clearly that the position was not tenable, overruled the demurrer without further inquiry; and it may be remarked, that the reasoning of the court is confined exclusively to matters of contract. The same observation may be made respecting the case of the Bank of Columbia v. Patterson, cited from 7 Cran. 299, which was an action of assumpsit for work and labor. Various questions arose in the progress of that cause; none of them, however, having a direct bearing on the case now before the court. The point most analogous was, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents [43. are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie.

The case of Dunn v. The Rector, etc., of St. Andrews' Church, 14 Johns. 118, was also assumpsit for work and labor. The only question agitated was, whether an action of assumpsit on an implied promise can be maintained against a corporation, which was decided affirmatively, on the authority of the two cases just considered.

Much reliance has been placed, by the plaintiff, on the case of Riddle v. The Proprietors of the Locks and Canals on Merrimack river, 7 Mass. 169. This was an action on the case, for not sufficiently opening and keeping in repair a certain canal, by reason of which the raft of the plaintiff grounded, in attempting to pass it, and was damaged. A verdict was rendered for the plaintiff, and a motion for a new trial having been overruled, a motion was made in arrest of judgment, on the ground that at common law no action lies against a corporation for a tort, because, among other reasons, judgment in such an action is entered with a capiatu, which would be absurd against a corporation. The court, in giving their opinion on this point, seem to admit the doctrine in 21 Edw. 4, 12, 27, 67, that a corporation can not be beaten, nor beat, nor commit treason, or felony, nor be imprisoned for a disseisin with force, nor be outlawed, and they add that these principles result from the nature of an aggregate corporation. But in remarking on the opinion of Thorp, Justice, in 22 Ass. pl. 67, in which he says that trespass does not lie against a corporation aggregate by its corporate name, they express doubts. Thorp's opinion, they say, has

been overruled, as to certain trespasses, and referring to some of the authorities in 16 East, from which they say it is very clear that some actions of trespass might at common law be maintained against aggregate corporations, they conclude that as in these cases no *capiatur* could be entered, the omission of this entry could be no objection to actions on the case. This concise statement is sufficient to show that the question now in hand did not necessarily arise. The point determined was, that trespass on the case would lie, and that judgment in such an action might be entered without a *capiatur*, and for this purpose only, the authorities relating to trespass and other torts were referred to. But it can not escape the most careless observer that neither the case decided, nor those 44] referred to, support the position \*now contended for, that assault and battery can be sustained against a corporation aggregate. Thorp's opinion was questioned only as to certain trespasses, and the court went no farther than to say, that some actions of trespass might be maintained, from which the conclusion naturally follows that, generally, that action can not be maintained, and they admit that a corporation aggregate, from its nature, can neither beat nor be beaten, which seems to be decisive of the question we are considering. It was urged by the plaintiff that the reason on which the law, under consideration, was originally founded, had ceased to exist, and that therefore the law itself has ceased, in conformity with the maxim, *cessat ratio, cessat etiam lex*. But however true this maxim may be, in the general, it is subject to exceptions. There are many principles of common law, settled on reasons that have ceased, and many more on reasons that have not only ceased, but are now forgotten, that are still in full force; as for example, it is law at the present day that debt and trespass can not be joined, although the reason of this law no longer exists, which was, that in debt the process was summons, on which a fine was paid to the king, in proportion to the sum demanded, but in trespass the process was a *capias*, and the court set a fine in proportion to the offense.

It is not, however, admitted that all the reasons, or that the most weighty reasons of the law in question, have ceased, for although the distinction of process is done away by our statute, yet it remains a truth that a corporation aggregate, as such, can not commit the act charged in this declaration, as they have no personal existence, and can neither beat nor be beaten. An action for an

assault and battery, committed on a corporation aggregate, in their corporate character, would be a novelty in judicial proceedings; and yet it appears to be as contrary to reason and common sense, that they should be the agents in such a trespass, as it is that they should be the objects of it. It is a fact entitled to some weight, that among the multitude of adjudged cases relating to corporations, from the Year Books to the present day, not one can be found that decides the principle as it is contended for by the plaintiff. Although it forms no objection to an action that such an one has never before been brought, yet the fact affords strong presumptive evidence that the law is against it.

On the whole, whatever exceptions may exist to the rule, that actions of trespass generally do not lie against corporations, it is evident that the action now under consideration can not be one of \*those exceptions, and therefore that it can not be sustained [45 against the bank.

The second question is, whether the defendants, Creighton and Dunn, can avail themselves of the demurrer, admitting that the corporation could not have joined in the tort, and that the action can not be sustained against them.

The law as laid down in 1 Chitty, 74, seems to be well established, that if several persons be made defendants jointly, where the tort could not in point of law be joint, they may demur, and if a verdict be taken against all, the judgment may be arrested or reversed on error. In other cases, says Chitty, where in point of law several persons may be jointly guilty of the same offense, the joinder of more persons than were liable, etc., constitutes no objection; one of them may be acquitted, and a verdict taken against the others. It was alleged in argument, that the concluding part of this authority limits the application of the preceding part, to torts of which only one person can be guilty, but there does not appear to be any necessity for such a limitation. On the contrary, to give effect to the whole passage, the concluding part must be taken with the qualification evidently imposed by the preceding part of it, and naturally implied by the terms used in it. The meaning of the passage seems to be, that in cases where in point of law all the defendants named in the writ may be jointly guilty of the offense charged, it is no objection that some of them are not guilty, for these may be acquitted, and a verdict taken against the others. This construction will give to the whole passage its

proper effect, and remove the apparent discrepancy produced by the opposite interpretation. It appears also to be required by other authorities applicable to the subject. For example, whatever proves the writ false, at the time of suing it out, shall abate it entirely, and if the falsity appear on the record, advantage may be taken of it by motion, or on demurrer. 1 Bac. Abr. 11, n. As if the writ issue against two persons, and one of them be dead before it be taken out, or if there be no such person as one of them, *in rerum natura*, or if in a *precipe quod reddat*, against two, one of them have the whole tenancy in himself, the writ shall abate at common law, though in the last case it is now saved by St. 25 Ed. 3. The question, then, occurs in the case before us: Was not the writ false at the time it was taken out, and does not this appear from the declaration? It charges an assault and battery to have been jointly committed by a corporation and individuals, when, in 46] point of law, a corporation can not commit a \*battery, either separately or jointly with others. It therefore charges the defendants with the commission of a joint act, which, in contemplation of law, they could not have jointly committed, and must, of course, be false.

It appears to be immaterial whether the objection to the joinder arise from the nature of the act, or from the character of the agent. Verbal slander can not be jointly committed by two, or more, therefore two defendants can not be joined in that writ. A corporation can not commit an assault and battery; that tort, therefore, can not be jointly committed by a corporation and others, consequently a writ that charges two or more persons with verbal slander, or that charges individuals with a battery, committed jointly with a corporation, can not be good, and for the same reason, because it presents a case in either instance in which the tort complained of can not be jointly committed by the defendants who are jointly charged. The writ would be false by the doctrine cited from Bacon, and the joinder would be bad on the authority of Chitty.

By what course of reasoning, or by what analogy, are we justified in limiting the operation of the principle to the nature of the tort, excluding the character of the agent? The reason of the law unquestionably is, that the declaration charges an act impossible in itself—it is false, and certainly it is not the less false because the impossibility of the joinder arises from the physical in-

ability of one of the defendants to participate in the act. The rule is, that several persons can not be made defendants jointly, when the tort can not in point of law be joint. In the case before us, it is impossible that all the defendants have joined in the tort; as to them, therefore, it can not be joint, and this impossibility is as striking and as operative as if it had arisen from the nature of the tort. It was admitted in argument, that a declaration charging two persons with verbal slander, is bad, on demurrer. There can be but one reason for this, which is, that the defendants could not, under any circumstances, jointly commit the act charged. And may it not be confidently asserted, that in the case under consideration, the defendants could not, under any circumstances, jointly commit the injury charged against them? On what foundation, then, can we maintain the distinction that has been contended for?

It is true that the case in 2 Saund. 117, cited by Chitty in support of his doctrine, was a case of slander, but it is believed if that case had been the one now before the court, instead of the case of slander, it might have been argued with equal plausibility, that the doctrine in Chitty would not embrace the case of slander.

\*On this branch of the subject, the plaintiff has relied on [47 the cases cited in *Yarborough v. The Bank of England*, 6 East, 10. These, however, go no further than to show that there have been instances of trespass against corporations, in which individuals were joined; but it does not appear that the question was raised in either of them, whether the action could be supported. In one of them, the objection was to the process; in the other, to the joinder, and in neither was the objection sustained. *Broke*, 34, is introduced as saying, "the better opinion was, that the writ was good." Yet the same author, pl. 43, tells us that trespass does not lie against corporations. It may also be observed, that if the defendants admitted (as it appears they did, without putting the question to the court) that trespass could be sustained against a corporation, they waived the principal objection to the joinder, to wit, the falsity of the writ, depending on the fact that one of the defendants could not, in point of law, commit the act, and therefore that the others could not have committed it jointly with him.

But in deciding the case before the court, it is not intended, nor is it necessary to assume the principle, that trespass will not lie in any case against a corporation, or that individuals may not be

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joined in the same writ with a corporation, for a tort which they may jointly commit. The doctrine is intended to be carried no farther than to actions of assault and battery. The case of *Yarborough v. Wood*, and Lord Ellenborough, in giving his opinion, says, that the defendants, as a corporation, can do no act but through the instrumentality of others, and that they can not, as a corporation, be subject to the process in trespass, because the remedies which attach on living persons, can not be applied to bodies merely politic and of an impersonal nature, but that wherever they may competently do or order an act by their common seal, they are liable to the consequences of such act; and to support his position and illustrate his meaning, he cites several actions against corporations for false returns. It may be added, that we should not naturally expect, in a case like this, to find a decision of the question on which the case in hand depends, and it may be safely assumed, that the question is not settled, either by the principal case or by the authorities cited. The plaintiff has also contended that the fundamental principles and settled maxims of the law ought always to be kept in view, one of which is, that every right must have a remedy, and every injury ought to be redressed. This is admitted, but it does not follow that the party complaining must have a choice of remedies, nor does the doctrine now advanced interfere with this acknowledged maxim; \*for although it be alleged that a corporation, as such, can not be made a defendant in an action of assault and battery, it is admitted that every individual who counseled, procured, or aided in the commission of the trespass, is liable. It is true in this case, as in every other, that the individuals held responsible may be insolvent, but the law is not chargeable with this evil, nor should it be condemned because it does not multiply remedies for the purpose of guarding against it. It was also urged that this demurrer can not be supported, unless the case be made an exception to this general rule or maxim, and that before this be done it ought to be shown clearly that it is an exception, and that it comes within the reason on which exceptions are founded. The case, however, is not considered as forming an exception, for the sustaining of the demurrer does not deprive the plaintiff of a remedy, but merely decides that he has sought one which the law does not give him. The rule requires nothing more than that each right should have a remedy, or one remedy. It can not, then, be violated by a de-

cision that the plaintiff has had recourse to an improper remedy, unless it be also a fact that the law has provided no other. But this is not the case. A remedy exists, which has been pointed out, and to which the party injured may have recourse.

The plaintiff might have entered a *nolle prosequi* as to the bank, and proceeded against the other defendants, but he has thought proper to insist on his right to sustain the action against all the defendants, and must now submit to the consequences of the demurrer, which must be sustained.



# CASES

DECIDED BY THE

## Supreme Court of Ohio,

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, DEC., 1823.

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### LUCKY v. BRANDON AND OTHERS.

Debtor imprisoned within the jail limits may go into private houses, or labor on private ground within such limits, without being guilty of an escape. Monuments not necessary to define the prison limits. It is sufficient to describe them by definite mathematical lines.

THIS was an action of debt upon a prison bounds bond, originally prosecuted in the common pleas of Stark county, and brought before the Supreme Court by appeal. It was reserved for decision upon a statement of facts agreed and subscribed by the counsel as follows:

It is agreed between the parties in this cause, that James Brandon, after giving the bond as mentioned in the declaration of the plaintiff, and before the sheriff liberated him, to wit, between the 27th August and 20th September, 1819, went off of the public grounds and streets in the town of Canton, and frequently wrought by days together on private property; that he was often in Tuscarawas street as far as the center thereof during the period aforesaid. It is further agreed that the affidavit writ hereto attached was made by said Brandon before James Williams, Esq., a justice of the peace, on 25th August, 1819, as certified by said justice;

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that notice of such affidavit and oath was given to the counsel of Lucky within a short period thereafter, who furnished money on his own account to the amount of ten dollars, to support said Brandon in prison, which was expended for that purpose at the rate prescribed by law; and that when that was so expended, the counsel refused \*to furnish any more funds for that purpose, [50 but did not, on the part of his client, permit or authorize the discharge of said Brandon, nor did he, in any wise on behalf of his client, refuse to support the said Brandon. And that Lucky, the plaintiff, never had notice of said oath or affidavit until after the discharge and enlargement of the said Brandon. And that Lucky, the plaintiff, lived in Wayne county, twenty-two miles from Canton, and his counsel lived at Steubenville, Jefferson county, fifty-eight miles from Canton.

The affidavit referred to was made by Brandon, and alleged that he had not the means of supporting himself in prison.

The certificate of prison rules was as follows:

The court affix the following as the jail bounds of Stark county: South of the jail to Tuscarawas street inclusive.

West of the jail to Poplar street inclusive.

North of the jail as far as the in-lots of the town of Canton extend.

East of the jail as far as Walnut street in Canton inclusive.

GOODENOW, for plaintiff:

On the facts agreed, the plaintiff will contend that he is entitled to judgment for the amount of the penalty of the bond.

1. Because the plaintiff was entitled to *personal* notice of the prisoner's having taken the oath that he was unable to support himself in prison, before he could be made chargeable with his support, or could be charged with the consequences of a neglect or refusal to support him. This point I will dismiss with one observation only. It seems to me absurd to say, that a plaintiff shall forfeit his right to hold the body of his debtor in restraint—a right guarantied to him by the common law of the land, the common consent of mankind, and the constitution of the state, by a mere implication of law, arising out of a statutory provision, made in derogation of that law which jurists call the *substratum* of all our laws; for it is certainly repugnant to common sense to say, a man *refuses or neglects* to do that which he could not have known

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it was necessary for him to do, otherwise than by *supposing* he was bound to know what it is agreed he did not know.

2. That James Brandon committed an *escape* between the 26th August and the 20th September, 1819, by "going without the limits of the liberties of the jail," as the same were fixed during said time. It will here become necessary to decide, what were the limits of the liberties of the jail. Under this head I shall inquire.

51] \*1. Whether the court of common pleas can extend the walls of the prison *over private property*, so as to make it a part of the prison, that the debtor *in prison*, who has given bonds, can "work for days together" thereon, and still be "within the *limits of the liberties of the jail*"—*within its walls*. If by any *fiction* the affirmative could be supposed, it would be a fiction against the *truth* and against the *legal* legitimate results flowing from the fact. By a *fiction*, the walls are *extended*, when *in fact* they are not; but the *intention* of the law is thereby effected, while that fiction travels not inconsistent *with the law*; when it does run repugnant to the law, as it does the moment it encroaches upon private property, it creates uncertainty, confusion, and injustice.

The *rules of the King's Bench prison* in England never include private property, unless it be that over which the marshal has a control and possession, as will be seen by examining the rules. 6 Term Rep. 305, 778. Yet there would be more propriety in embracing private property in those *rules* than in our *limits*, for the prisoner *there* is at the *risk* of the marshal, and every moment at his mercy and control, and can not, as he can *here*, claim the *liberties* as a *right* on giving bond: *there* the marshal may or may not allow the *rules* to his prisoner, and when once allowed, he may put a period to the indulgence when he pleases, and imprison the debtor in *stronghold*. The rules are merely an indemnity to the marshal, excusing him for thus indulging his prisoner. Besides, his prison is changeable: he may locate it where he pleases, with the assent of the court, and it is not always a particular spot or building exclusively belonging to the public.

Not so *here*: our jails are county property exclusively, occupied by the state in some instances only; and how it can be supposed that their walls can be, by fiction of law, mingled, or rather jumbled, with private property, houses, outhouses, gardens, private walks, and the utmost retired recesses of our domestic firesides, for

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the purpose of extending those walls to accommodate a prisoner—and yet the sheriff, or jailer, dare not step a foot upon such private domain without leave—is to me incomprehensible on legal principles.

What are the provisions of our laws on the subject? Our constitution provides that a man's body shall not be confined in prison after delivering up his estate, unless on strong presumption of fraud. This is a clear recognition of the creditor's right, as it existed at the formation of that instrument, to coerce payment by imprisonment. Our act of the general assembly, passed \*Jan- [52] uary 12, 1805, provides that every person imprisoned on mesne process or execution shall be permitted and allowed the privilege of prison bounds, which are or may be laid off and assigned by *metes and bounds around and adjoining each county jail*, by the judges of the court of common pleas, etc. The condition of the prisoner's bond is for his "safe continuing in the custody of the jailer within the limits of his prison bounds," until legally discharged. Can this law be construed as giving the court power to assign *private property*—to say that the walls of the prison shall extend over my garden, lands, or houses? I think not; and should the court transcend their power, their acts would be, *ipso facto*, void. *Baxter v. Taber*, 4 Mass. 361. But let me ask, how the court can establish "*metes or bounds*" upon my land, or run a line across it for that purpose; or how can a lot owned by me exclusively, separated by a dozen lots of other men, be said to adjoin, or to be around, the county jail? Can they run an *ideal* line, and send the prisoner upon it, when neither they nor any other officer in the county dare follow?

What shall we take as a guide; what *data*, by which to determine whether, upon this act of the assembly, the court can cover private property with the "*huge walls of a prison*," or even give it the character of a prison? Had the legislature intended any such thing, and the court had pursued such intention, it would be a violation of the constitution. *Baxter v. Taber*. But we have no reason to infer that the legislature had any such intention. It is manifest they had not, from the language they have used; and, besides, the known and settled principles and doctrines of the common law of the land must have been present to the legislative mind, when the act was passed, as they are now to the court, and if any such innovation was intended, it would have been ex-

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pressed, and not left to implication. A reference to the laws, usages, and decisions of our sister states, will enlighten this subject, perhaps, to advantage.

In *New Jersey*, "the inferior courts of common pleas are empowered and required to make and lay out the bounds and rules of the prisons in their several counties, not exceeding three acres of land adjoining such prison." The condition of the *bond* is, that the "prisoner keep within said bounds," and on giving the bond, "he shall have liberty to walk therein." *Laws of New Jersey*, Trenton edition, 1821, 426.

In *North Carolina*, the county courts have power to make out such a parcel of land as they shall think fit, not exceeding six acres, adjoining to the prison, for the rules thereof;" and every prisoner, 53] \*etc., on giving bond, "to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his health." *Laws of North Carolina*, 150.

In *New York*, the law provides, that "It shall be lawful for the court of common pleas to appoint a certain reasonable space of ground adjacent to the jail of the county, to be denominated the liberties thereof, etc.; and such court shall cause the same liberties and their limits to be designated by *inclosures and posts*, or other visible marks placed on the outer lines of said liberties;" and the condition of the bond for the liberties, is, "that such prisoner shall remain a true and faithful prisoner, and shall not at any time nor in any wise escape or go without the limits of the liberties aforesaid, until discharged by due course of law." 1 N. Y. Laws, 428.

In *Massachusetts*, "the court of general sessions of the peace shall fix and determine the jail yards to the several jails appertaining to their several counties;" and the condition of the bond is, that "from the time of executing such bond, he will continue a true prisoner in the custody of the jailer and within the limits of the prison, until he be lawfully discharged, without committing any manner of escape. *Laws of Mass.* 1784, M. 41.

It appears from the laws of the different states—and I have referred to such as came most conveniently to my hand—and the decisions of their courts, and long and uniform usage, that the liberties of the prison, the prison bounds, or the yard of the jail, or by what other name soever the same may be called, is but an *extension of the walls of the prison*; and the *lines, posts, marks*, or in-

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*closures* of such yard or liberties, are those walls. *Peters and Gedney v. Henry*, 6 Johns. 121; *Baxter v. Taber*, 4 Mass. 361. See also *Bonafous v. Walker*, 2 Term Rep. 126. And such has been the decision of this court on the statute of Ohio, allowing *liberties* to debtors in prison.

Hence I would again inquire: Can private property, upon which it is agreed that *James Brandon* "wrought for days together," be considered within the walls of the prison? I think not, even should it be decided that the *limits of the liberties*, as assigned by the court of Stark county, *extend around* any private property. The court, in the case last cited from Massachusetts, say, that they "can not admit that the sessions can, by any order of theirs, make the private property of others, of which by law they have the exclusive use, a part of the county prison;" and where is the discrepancy between their prisons and the powers of their sessions, and our prisons \*and the powers of our courts of common pleas? There [54 is none in law or reason, whatever the devious practice of either may have been; and none can be created without a departure from the long and inveterately settled doctrines of the common law, distinguishing between public and private rights, and between the rights of creditors and those of debtors. And I can not find a case in any of the reports of the states, where the question was directly presented for decision, wherein it has not been unhesitatingly and unanimously decided that private property can not become a part of a public prison. "It is urged," continues the enlightened court of Massachusetts, in the case above cited, "that by virtue of this clause [the clause of the law which has been cited, giving power to the sessions] the sessions may extend the limits of the jail yard at its pleasure, including within its limits a whole town, and making every man's house and land a part of the prison, of which the sheriff has the custody." "We are satisfied, however, that *no opinion could have less foundation*." "To give a power of this extent to the sessions, could not have been within the intent of the statute; and if the legislature had intended it, it is manifest that the execution of the power would have been unconstitutional, as it would have been an appropriation of private property to public uses, without compensation to the proprietor."

Should a distinction be attempted to be drawn between the "prison yards" of *Massachusetts* and our "prison bounds," I think the attempt will be abortive, as to the question now before the court.

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It is not arguing soundly or legitimately, to say, that although the limits of the liberties, embracing or including within their lines private property, do not give the prisoner a *right* to go upon such private property at his own will and pleasure, yet permit him to go if the owner will give him license. If the *law* does not give him the *right* to go upon private property, he is *out of the custody of the jailer* if he steps upon it. This potential right, which may be exercised with the permission of a third person, the owner of the property, is inconsistent with the privilege purchased by his bond, upon giving which the law says, he "*shall be permitted and allowed the privilege of prison bounds*;" and is inconsistent with the restraint imposed upon him by the laws of the land. This is an irrefutable answer to all such logic.

But suppose we inquire a little closer into this matter. What privilege does the prisoner acquire by the bond, and what has been the object of allowing him that privilege? The object, with all 55] \*legislatures who have passed laws on the subject, has not been to take away from the creditor *his privilege* of coercing his unwilling debtor by the restraint of his liberty, or to render that restraint ineffectual; but it has been, in the language of the law of North Carolina, "to preserve his health"—for air and exercise. And the privilege acquired by the debtor in prison, is, in the language of almost every statute of the different states on the subject, "*to walk*" within the limits of the prison bounds. But I am willing to be as liberal as the most flexible principle of the law will justify, and say, that he may go anywhere within the liberties, either in the night season or the day-time, for his convenience, comfort, pleasure, benefit, or recreation. But there should be some *limits* to these limits of the prison walls, known and certain "by metes and bounds," that parties may know their rights, if they have any left. And I beg the court to allow me to refer them to the opinion of the court, delivered by Chief Justice Parsons, in the case of *Baxter v. Taber*, before cited.

Arguments from convenience and common usage under a law—for even twenty years of its open violation, to the infringement of the long established constitutional rights of parties, it seems, ought to be listened to with caution. And I may well ask, can the most solemn decision of this court, in support of an illegal usage, render it legal? It is fashionable, I know, at this day, to talk of the liberty of the citizen, and the barbarity of imprisoning a man for

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debt: but such language ought not to be addressed to judicial tribunals, but to the ear of the legislature; and let it be remembered, that "inconvenience to individuals can not alter the law, nor bend it to particular cases;" that there is no *necessity*, even for the legislature to allow the indulgence to prisoners for debt, which are contended for. That imprisonment for debt might be abolished, has been my prayer during my life; but while the legal right remains to the creditor, it must have its legal measure. If the prisoner, who is confined for debt, does not avail himself of the benefit of the *insolvent law*, and give up his property; nor take the *oath* that he is unable to support himself in prison, the presumption is he has the means of support and of paying his debts, but means to defraud his creditors. If he does give up his property, he is beyond the reach of imprisonment; and if he takes the *oath*, the creditor is bound to support him *in prison*, and pays the jailer for his food at his table, and for lodgings in his house; and if bond be given for the liberties, the prisoner is entitled to free air and exercise *within the limits*. \*But to say that he shall enjoy the same liberty and privilege [56 as any other man in the town wherein the jail is located, or within the *imaginary intended walls* of the prison, is at once making a *gentleman* of him, entirely above his neighbors—enjoying all that others can, "faring sumptuously every day," and bidding defiance to his creditors. This is taking from the creditor *his rights*, and is administering *partial and unequal justice*: the man in town has a privilege that one in the country has not: the law operates as a restraint upon one and not upon the other. This, as the court say in the case of *Baxter v. Taber*, is stripping the law of that impartiality which is one of its vital principles.

2. But one other consideration is submitted to the court upon which no argument can be really necessary. There is not, *in fact*, by the pretended assignment of prison bounds by the court of Stark, any space whatever "laid off and assigned by metes and bounds around and adjoining said jail." The word "*inclusive*," wherever it is used in the copy of the journal of the court of common pleas of Stark county, herewith presented to the court, can claim and receive no other than its appropriate sense, its common acceptance. To extend a point or a line to another point or line, *inclusive*, is a new expression, or use of terms. But, say it means to include the thing extended to; how much is there included in the first line drawn by the court of Stark—"south of the jail to Tuscarawas



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street inclusive?" Does it include the intermediate space between the jail and Tuscarawas street—or does it include the width of that street, which would add so much to the *extent* of that line—or does it include the *width* of that street, and also its extent east to the intersection of Walnut street, and west to the intersection of Poplar street? This is giving the word "inclusive" three meanings wherever it is used. My impression is that the court intended to assign as prison bounds that space of ground which is included in a line drawn on the north side of Tuscarawas street, and continued by making a right angle at the junction of Tuscarawas and Walnut streets, and running north on the west side of said Walnut street to the north line of the *in-lots* of said town, thence on said north line west to the east side of Poplar street, and thence on the east side of Poplar street until this line intersects the aforesaid line drawn on the north side of Tuscarawas street. No other supposition would allow to them an intention that was rational. If this was their intention and the court are of opinion they can give that intention effect, by saying that such a line as above described was the 57] \*line constituting the limits of the liberties of the jail, "*laid off and assigned by metes and bounds*," the plaintiff is entitled to judgment; for the facts agreed show that James Brandon committed an escape by going into "the middle of Tuscarawas street."

Again, how can it possibly be said, that the "bounds" assigned by the court run on the south side of Tuscarawas, the east side of Walnut, the west side of Poplar streets, and on the north boundary of the *in-lots*: such *lines* can not be made, by any language used by the court, if they had employed the word *inclusive* twenty times oftener, *to meet, so as to include any certain space*.

But the law requires the court to lay off and assign the prison bounds by *metes and bounds*: have they done this? It would be preposterous to say they had. What do these words, "*metes and bounds*," signify in law, and in what sense are they to be interpreted? They are employed here as describing a certain space of ground to be laid off and assigned by the court; they must be construed to mean *visible monuments or marks, designating the distance and outer limits of the prison bounds*. Whether any such visible monuments or marks have been placed or erected, I need not ask; nor need I, I imagine, remark, though I can not well refrain from it, that the *laying off and assigning* merely, is not a comple-

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tion of the duty of the court, but they must do it by, "*metes and bounds.*"

Again, the "prison bounds" are to be laid off and assigned by metes and bounds *around and adjoining the jail*. No land or space of ground that does not *adjoin* the jail can be assigned, I suppose, because there is no authority to do so; what, then, is not attached to, or does not belong to, or pertain to the jail, does not *adjoin* it. If A. and B. each own a lot in Canton, and D. owns one that lies between them, they do not *adjoin*. D. and B. *adjoin*; so do D. and A.; but A. and B. no more *adjoin* than the county of Hamilton *adjoins* the county of Ashtabula; and it will make no difference whether we apply to Lord Kaimes or Lord Coke, or Jacobs or Walker, for the meaning of the word *adjoin*.

These different views, which I have endeavored to present with as little prolixity as possible, will show the danger and uncertainty which must result by a departure from the settled principles and doctrines of the interpretation of statutes; and that to bring private property within the walls of the prison, as a component part of the jail, every species of violence must be committed upon the language of the law, the decisions of courts, and the common sense of mankind.

\*I will conclude by observing, that if there be no *bounds laid off and assigned*, it is not the fault of the plaintiff. *He* is called upon not only to concede all on his side, but must support the defendant into the bargain. It is the sheriff's and debtor's business to look to the limits, to know if any are assigned, and to keep within undisputed bounds. *Kip v. Brigham*, 7 Johns. 168; *Bissell v. Kip*, 5 Johns. 89. For the inquiry is here, whether the defendant committed a breach of the condition of the bond, which condition is like that of all the bonds required by the statutes of the different states, that the debtor should remain a "true prisoner in the custody of the jailer, and not go out of the limits."

HARRIS was counsel for defendant, but presented no argument.

By the COURT:

The first point made is, that the plaintiff ought to have personal notice that a debtor in prison has made oath that he is unable to support himself, before the prisoner can be discharged. Where the residence of the plaintiff, or his attorney,

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is known, this notice ought to be given, and it ought to be given in a reasonable manner, so as to produce effect. Whether it were most reasonable to give it to the party, or to the attorney, must depend upon the circumstances of each particular case.

A creditor can not be said to neglect or refuse to support the prisoner, when he has no knowledge that such support is required of him. This notice, therefore, can not be dispensed with, unless it is impossible to give it, as where the residence both of plaintiff and attorney, or other agent, can not be ascertained, which can seldom happen. In this case, the notice was given to the attorney. The attorney acted upon it, and furnished support for a time. This was an acceptance of notice, and it is too late for the plaintiff to object to the want of it.

The second point made is, that the prison bounds can not be extended over private property, so as to authorize the prisoner to enter private houses, or labor on private grounds, within the condition of his bond. The court can not adopt the reasoning by which it is attempted to sustain this position, and the rejection does not include the proposition that the prisoner acquires a right to go where he pleases upon private property, without the consent of the owner. The prisoner acquires, within the limits of the prison bounds, no other right than that enjoyed by every other citizen, to associate where admitted, and to labor where employed. 59] The \*public assumes no other control over the property or persons within the bounds than over the property and persons of other citizens. Within the bounds prescribed, the rights of the prisoner are the same that he would enjoy were he not imprisoned. This is what the law intended to confer, and the practice under it has been uniform in adopting this interpretation.

It was not the object of the law to permit air and exercise only. It intended to afford an opportunity to labor, to employ himself if he could, for the support of himself and family. Any other construction would make him a mere idle saunterer in the streets, exposed to the temptation of vicious indulgence, and setting an evil example to others.

The statute directs that bounds may be laid off and assigned around and adjoining the prison, so that these bounds shall not extend more than four hundred yards in any direction from the jail. A subsequent law extends the prison bounds to the corporation limits of the town in which the jail is situate, or if the town

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be not incorporated, then to the limits of the recorded town plat. According to the plaintiff's argument, the prisoner may range within these limits anywhere upon the public ground, and the public streets and alleys, but he can go nowhere else. He must retire to the jail to sleep, to eat, and to perform all the offices of nature, or these must be attended to in the public streets. Such a construction was never thought of by our legislators; it therefore could not have been intended by them. The court have not looked into the authorities cited by the plaintiff on this point; they could not adopt them if they sustain his position. The question stands too clear upon principle and sound practical good sense, to be decided against these, in deference to any authority.

The third point is, that the rules assigned by the court of common pleas are not defined by metes and bounds, and therefore do not so exist as to warrant the prisoner going at large. If this point is well taken, it can not entitle the plaintiff to recover upon the prison bounds bond. If no bounds were assigned, the bond was taken without authority, and against law. The sheriff might be liable for an escape, but the bond could not be sustained. The point, however, is not well taken. The assignment of limits or bounds is clear and certain. These bounds are mathematical lines, not visible actual monuments. It never was intended that the bounds around the jail, extending in each direction four hundred yards, should be wholly inclosed by visible actual monuments. Upon the plaintiff's argument, these must be continuous [60 around the whole area of the limits. If monuments be set up at certain points, and the line between described only mathematically, it would not be sufficient. The space between the monuments would not be designated with that certainty which is contended for. This consequence of the argument would seem sufficient to show that it is not tenable.

It is lastly contended for the plaintiff, that Tuscarawas street is not included within the bounds as assigned by the court. These bounds are extended "south of the jail to Tuscarawas street *inclusive*." This term includes Tuscarawas street and establishes the southern line of that street as the southern limits of the bounds. The bounds further extend west of the jail to Poplar street, inclusive. East of the jail, as far as Walnut street in Canton, inclusive. Tuscarawas street, from its intersection with Poplar street, west, and Walnut street, east, is thus clearly included within the bounds.

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The prisoner was not out of the bounds when upon Tuscarawas street, anywhere between its intersection with Poplar and Walnut streets. The case agreed does not show that he was on that street, east or west of this intersection. It does not therefore show him out of the bounds.

Judgment must be for the defendant.

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## GOODENOW v. TAPPAN.

Plea in abatement misnomer in plaintiff's baptismal name; replication that the plaintiff is known by one name as well as the other, good.

Words spoken in discharge of official duty not actionable.

If spoken under pretense of official duty, wantonly and with malice, words are actionable; the intention with which spoken to be left to the jury.

Words actionable spoken of an attorney.

THIS cause came before the court upon a motion in arrest of judgment, reserved in Jefferson county, and certified to this court for determination. As two important points were ruled in the previous proceedings, and as the cause is of importance to the two respectable gentlemen who are the parties, and who are now both members of the profession, a brief history of the case is here presented.

The declaration was as follows:

1st Count. "For that whereas the said Goodenow is a good citizen, and has always maintained a good character from his youth 61] \*to the present time, and for divers years has been an attorney and counselor at law of the several courts of judicature of the State of Ohio; yet the said Tappan, well knowing the premises, but contriving and maliciously intending to injure the said Goodenow in his good name and professional character, and to bring him into public scandal and disgrace, and to destroy his practice as a lawyer, and to harass, oppress, and impoverish him, heretofore, to wit, on the 31st day of December, in the year of our Lord one thousand eight hundred and sixteen, at the county of Jefferson aforesaid, in a certain discourse which he, the said Tappan, then and there had, of and concerning the said Goodenow, and of

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and concerning his said profession and standing as an attorney and counselor at law, as aforesaid, in the presence and hearing of divers good and worthy citizens of this state, then and there, in the presence and hearing of those citizens, falsely and maliciously spoke and published of and concerning the said Goodenow, and of and concerning his said profession and standing as an attorney and counselor as aforesaid, these false, scandalous, malicious, and defamatory words following, that is to say: 'He (meaning the said Goodenow) fled his country to escape from justice, and now disguises himself (again meaning the said Goodenow) under a borrowed name; he (again meaning the said Goodenow) is unfit to be trusted.'"

*2d Count.* Same inducement as in the first. Words charged: "He is of infamous character—he broke jail in New England and fled from justice."

*3d Count.* Same inducement as in the first. Words charged: "He is a d——d rascal, and an immoral and base man, and unless ignorance of the law makes a lawyer he is no lawyer—he is an ambidexter and a disgrace to his profession."

*4th Count.* "And whereas, also, the said Goodenow is a good citizen and of upright character, and as such has always conducted himself from his childhood to the present time; and now is, and for divers years has been, an attorney and counselor at law of the courts of judicature in this state; and whereas, also, before the committing of the several grievances by the said Tappan, as hereinafter mentioned, a certain appointment was pending, in the power and disposal of the court of common pleas of the county of Jefferson, to the office of prosecuting attorney of the State of Ohio for said county; and whereas the said Goodenow was proposed and considered of as a candidate for said appointment, nevertheless, the said Tappan, well knowing the premises, but contriving and wickedly and \*maliciously intending as aforesaid, hereto- [62 fore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventeen, at the county of Jefferson aforesaid, in a certain other discourse which he, the said Tappan, then and there had and held with divers other good and worthy citizens of this state, of and concerning the said Goodenow, and of and concerning his profession and character as an attorney and counselor at law as aforesaid, and of and concerning the appointment of prosecuting attorney as aforesaid, then and there, to wit, on the

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day and year last aforesaid, falsely and maliciously spoke and published of and concerning the said Goodenow, and of and concerning his said profession and character as an attorney and counselor at law as aforesaid, and of and concerning the appointment aforesaid, and in the presence and hearing of the said last mentioned citizens, these other false, opprobrious, malicious, and defamatory words following, that is to say: "He" (meaning the said Goodenow) "is a man of immoral character. He" (again meaning the said Goodenow) "broke jail in his own country, and fled from justice."

*5th Count.* Same inducement and colloquium as in the fourth. Words charged: "He is destitute of character; he broke jail in New England, and fled to escape the lash of the law, and now wears a borrowed name."

*6th Count.* Same inducement and colloquium as in the fourth count. Words charged: "It won't do to appoint such a man; he is of bad character; a man that broke jail and fled from justice is unfit for any office."

*7th Count.* Without any inducement. Words charged: "He is a runaway—he broke out of jail in New England and fled from justice."

The defendant, by consent of the plaintiff, obtained leave to plead at the same time, both in abatement and in bar, as many several pleas as he might deem necessary for his defense, without the pleas in bar being considered a waiver of the pleas in abatement.

He then pleaded in abatement that said "Goodenow is named and called by the name of Milton Goodenow, and by the name of Milton Goodenow from the time of his baptism hitherto hath always been called and known, without that he now is, or at the time of suing out the said writ was, or ever before had been called or known by the name of John Milton Goodenow," etc., and verified the plea by affidavit as the statute required. He also pleaded the general issue upon which issue was joined.

**63]** \*To the plea in abatement the plaintiff replied that "the said John Milton Goodenow long before, and at the time of suing out the said writ, and of filing his said declaration, was and still is called and known as well by the name of John Milton Goodenow, as by the name of Milton Goodenow," etc. To this replication the defendant demurred.

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The question upon the demurrer was argued in Jefferson county, at the October term of the Supreme Court, 1819, before Judges Pease and McLean—when the demurrer was overruled, and the cause continued to be tried upon the issue.

A trial was had at November term, 1822, before Judges Pease and Hitchcock, and a struck jury. The testimony to prove the speaking of the words was as follows:

*Alexander Sutherland, Esq.*—At the F. and M. Bank, in Steubenville, in the winter of 1817, after Mr. Goodenow had been elected a justice of the peace the second time, there was a conversation between Judge Tappan, Thomas Scott, the cashier of the bank, and witness. Judge T. began *boring* witness for having supported the plaintiff for the office of justice of the peace, he having, as witness understood, opposed said Goodenow's election. Tappan said, "Where he came from, it required the best men to be elected to office, but here it made no odds." Witness then observed, "Some time since a *lawyer* could not have been elected;" upon which defendant replied, "As to Goodenow's law knowledge, God knows, that ought to be no objection to him." Witness further stated, that plaintiff had always been known in his practice as a lawyer by the name of John M.

On his cross-examination, he stated that plaintiff had been elected a justice, and the election set aside on Mr. Wright's remonstrance, on account of the votes not having been opened agreeably to law, and a new election ordered.

*Samuel M'Elroy, Esq., late an associate judge.*—Before the appointment of Mr. Hallock, prosecuting attorney, but whether while the office was vacant, or before it became so, witness could not recollect which, in a conversation with Judge Tappan concerning the appointment of a prosecuting attorney—there being several candidates, and among others the plaintiff was spoken of—he said, that Goodenow had left his own country privately, that he was not a law character, and that his christian name was not John M., but Milton. This conversation was at defendant's house, and considered by witness as private and confidential, and had not before the present moment been divulged.

*\*Thomas Turner's deposition.*—That a short time after Judge [64  
Moore's return from the legislature in the month of February, he, with Judge Moores and James Moores, Jr., were at Judge Tap-



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pan's, James Moores, Jr., having an intention of offering for the clerk's office. Judge Tappan asked Judge Moores who he thought a proper person for state's attorney; Judge Moores observed, he knew of no person but Goodenow. Judge Tappan said, "Goodenow won't do—he is an immoral character—he broke jail for debt or otherwise—ran away and changed his name."

*Col. James Moores, Jr.*—Witness' father, Thomas Turner, and himself were at Judge Tappan's in February, 1817, when the subject of appointing a prosecuting attorney was introduced. Judge Tappan said, "It won't do to appoint Goodenow—he is an immoral character—he broke jail—fled his country, and changed his name."

*James Moores, Sen., Esq., associate judge.*—The 3d or 4th of February, 1817, he was in Steubenville, with his son, and son-in-law Turner; his son, having some intention of applying for the office of clerk of the courts, which was then vacant, asked him to walk down to Judge Tappan's. He went with his son and son-in-law, and after some little conversation, Judge Tappan turned himself full in the face of the witness, and said, "It won't do to appoint Goodenow prosecuting attorney." Witness asked, why? He replied, "He is an immoral character (or an immoral man)—he broke jail and fled his country (or fled from justice)—changed his name, and now wears a fictitious one." On the day before, defendant had been conversing with witness about the appointment of a prosecuting attorney, when defendant spoke in favor of Mr. Hallock—said he was a better draftsman, etc., and stated to witness that Judge Anderson was agreed to Hallock's appointment; to which witness replied, if that was the case his assent was not necessary, for the defendant and the other judges would overrule him. Defendant replied, he wanted no overruling about it. At that time witness was in favor of Goodenow's appointment; but when, on the next day, the judge made the charges before stated, he gave Goodenow up. Witness stated further, that the plaintiff had always been known, in his practice at the bar, by the name of John M. and none other.

On his cross-examination, witness said he had, some time in the fall season of 1816, conversed with the plaintiff about the office of prosecuting attorney, and asked him if he would accept it if it became vacant. He said he would, but not to the prejudice of Mr. Wright, the then incumbent.

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\*The plea in abatement, and the affidavit attached to it, and [65 the certificate of plaintiff's admission by the Supreme Court to practice as an attorney and counselor at law, were then read.

A number of depositions taken in New England were read, by which it was most clearly established that the plaintiff was baptized by the name of John Milton Goodenow, but had generally transacted business and been known by the name of Milton Goodenow only. It also was placed beyond all doubt that he had always sustained a fair character, though he had been unfortunate in trade, and that he left New England publicly, and brought with him to this country most respectable testimonials of the rectitude of his moral principles, of his integrity, intelligence, and ability.

On the part of the defendant, John C. Wright, Esq., and William Lowry, Esq., were introduced, with sundry documents, to prove that plaintiff had borne the name of *Milton Goodenow* before and after his coming to Steubenville to reside. The plaintiff's counsel conceded, and wished it to be understood, that they did not deny that the plaintiff had generally used the Christian name of *Milton* only, before and after he came to Steubenville, which was in September, 1812, until he was admitted to the bar in August, 1813. Mr. Wright also stated that the plaintiff brought letters of introduction from his brother, and perhaps from others, to him, when he came to Steubenville; that he then used the name of *Milton* only; that he read law with him awhile; and that he gave him a certificate of good moral character, by the name of *John Milton Goodenow*, upon which he was admitted to an examination before the Supreme Court. Witness further stated, that when plaintiff first came to Steubenville he invited him into his family, where he resided for some time, and his conduct was fair and honorable.

The case was opened to the jury by Mr. Root, for the plaintiff; but the counsel for the defendant declined arguing the cause to that tribunal. They moved the court to instruct the jury that the plaintiff was not entitled to recover on the words proven, because:

1. The words were not *in themselves* actionable.
2. That if intended to be made so, by reference to the professional character of the plaintiff, they would not support an action, because they related to a time *anterior* to the plaintiff's admission to the bar.

3. That, if the words were spoken, as he contended they were, in *confidence*, they were not actionable, *without express malice* were proven: and,

66] \*4. That, if spoken by the defendant in discharge of his *official duty* as president judge, he was *protected by the law*, and no action would lie.

This motion was argued by Mr. Wright for the defendant, and Mr. Doddridge for the plaintiff; and when the argument on the motion was closed, Mr. Silliman proposed to conclude the case by an argument for the plaintiff to the jury: but it was objected to by the defendant, and ruled by the court, that the practice had long been settled, that where the counsel for the plaintiff had made an argument to the jury (the testimony being closed), to which the defendant's counsel declined to reply, he is not permitted to address the jury a second time.

The court instructed the jury upon the law governing the action, and—"that words, although not actionable in themselves, may become so when spoken of a man in his professional or official character, if they impute to him dishonesty, want of skill, or any other matter that renders him unfit for the profession or occupation which he fills. That malice is the *gist* of the action, and that malice is implied from the untruth of the charge; but that this implied malice may be done away by circumstances; that it is necessary for public good that judicial officers, as well as others in whom an appointing power is lodged, should be protected in a free and unrestrained communication on the qualifications of candidates before them; but this should be exercised in good faith, and ought not to be used as a cloak to cover malicious or wanton attacks upon those who may offer themselves for public employment. If, in the case submitted, the jury should be of opinion that the words were spoken in the discharge of the defendant's official duty, as presiding judge of the court before whom the plaintiff was a candidate for an office which was in the power of that court to bestow, and that the words were spoken in confidence, and without malice, they would then be stripped of that malice which constitutes the legal character of slanderous words, and the defendant would be entitled to a verdict. But this was a question of fact to be left to the jury to decide; and if they should not find the situation of the parties, and the circumstances under which the words were spoken—the time, manner, and place of speaking—such as to divest

them of their natural malicious import, the defendant would not stand excused."

The jury found the defendant *guilty*, and assessed the plaintiff's damages at *six hundred dollars*.

The defendant filed reasons for a new trial, and also in arrest of judgment. The reason for a new trial was as follows: [67

The verdict is against the law and evidence in this, that the only evidence upon which the verdict could be rested, is evidence of consultations and conversations held by the defendant to and with Judges M'Elroy and Moores, his associate judges of the court of common pleas of Jefferson county, of and concerning the appointment of a prosecuting attorney for said county, for which office the plaintiff was a candidate, and that by the law of the land no action of slander will lay, or can be sustained upon and for words so spoken in the discharge of an official duty.

In arrest of judgment, it was alleged that the *third, fourth, fifth, and sixth* counts in the declaration were not actionable.

The motion for a new trial was argued for the defendant by Hallock and the defendant himself, and by Silliman for the plaintiff.

For the defendant, it was insisted that the nature of malice in reference to slanderous words was to be determined:

*First.* By the nature and character of the words: as where words are actionable in themselves, if false, there malice is absolutely inferred.

*Second.* Where words are not actionable in themselves, but are made so by circumstances, as by proving malice expressly.

*Third.* Where from the occasion of speaking the words, the law does not permit malice to be inferred.

In this case the words belong to the second or third class.

Malice must be proven *aliunde* or expressly in all cases where words are spoken in confidence. Bul. N. P. 8.

No action lies in such cases, unless there should be "extraordinary circumstances of express malice." 4 Bur. 2425; 1 Term Rep. 110. Such as there was in the case of *The King v. L. Abington*, 1 Esp. 226.

If this case be of the second class there is no evidence to support it. No evidence was given of express malice.

No action lies for words written or spoken, however false and scandalous, if such matter were written or spoken in a course of

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justice, and before those who have power to examine it. *Buckley v. Wood*, 4 Co. 14; *Croke Eliz.* 230, 248; *Lake v. King*, 1 Saund. 132, and note 1; *Astley v. Young*, 2 Bur. 808; *Weatherston v. Hawkins*, 1 Term Rep. 110; *Barbould v. Hookham*, 5 Esp. N. P. 109; *Johnston v. Evans*, 3 Esp. 32; *Thorn v. Blanchard*, 5 Johns. 508.

Case stronger for the defendant than any in the books.

68] \*1. He was in the discharge of an official duty, consulting with his associates as to the appointment of prosecuting attorney.

2. He spoke the words to none but the associate judges, and to them only when the appointment was the subject of conversation.

3. He had no reason to suppose that words thus spoken would be repeated or divulged.

There is nothing in the testimony to warrant the jury in finding that the words were not spoken in good faith, or to justify them in saying that the official occasion was used to cover a malicious or wanton attack upon the plaintiff. The court placed the defendant's liability upon this ground, and the verdict is against the fact, if the court were right. But it is insisted that, upon the authorities quoted, it is clear that for words spoken in the performance of official duty, no action can be sustained, even if the words are both false and malicious; for the question of malice can not be examined. It can not be inferred, neither can it be proved.

Mr. SILLIMAN, for the plaintiff, maintained:

That the testimony supported the verdict in finding the fact of malice. He insisted also that the just inference from the whole testimony was, that the words were not spoken in confidence to the associate judges, because spoken to one of the judges in the hearing of others. The testimony of Sutherland also proved malice. He maintained that the law was stated correctly in the instruction of the court, and that the verdict of the jury conformed to it.

No argument was had on the motion in arrest, and both motions were held under advisement. At the sitting of the Supreme Court in Franklin county, December term, 1822, the motion for a new trial was overruled, and the motion in arrest certified back to Jefferson, that the defendant might have an opportunity to argue it.

At September term, 1823, at Jefferson county, the defendant ob-

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tained leave to amend his motion in arrest, and then extended his exceptions to all the counts in the declaration. The determination of this motion was reserved for decision by all the judges.

HAMMOND, in support of the motion:

The declaration in this case contains seven counts, upon which entire damages have been assessed by the jury. If any one of the counts be bad, the judgment must be arrested. 3 Wilson, 185; Douglas, 722; 6 Term Rep. 691; 8 Johns. 119.

The inducement to the three first counts sets out, that the plaintiff \*is an attorney and counselor at law of the several courts [69 of this state; that in a conversation of and concerning the plaintiff and of and concerning his profession and standing as an attorney and counselor, the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning his profession and standing as an attorney and counselor, the following words:

"He fled his country to escape from justice, and disguises himself under a borrowed name. He is unfit to be trusted.

"He is of infamous character. He broke jail in New England, and fled from justice.

"He is a damned rascal and an immoral and base man; and unless ignorance of law makes a lawyer, he is no lawyer. He is an ambidexter and a disgrace to his profession."

The inducement to the fourth, fifth, and sixth counts charges that the office of prosecuting attorney was about to be filled, and that the plaintiff was a candidate, and alleges the words to have been spoken of and concerning the plaintiff and his profession and character as an attorney and counselor, and of and concerning the appointment of prosecuting attorney. The words are:

"He is a man of immoral character. He broke jail in his own country, and fled from justice.

"He is destitute of character. He broke jail in New England, and fled to escape the lash of the law, and now wears a borrowed name.

"It won't do to appoint such a man. He is of bad character. A man that broke jail and fled from justice, is unfit for any office."

The inducement to the seventh count says nothing of the profession of the plaintiff, and the words are alleged to be spoken of him without any reference to a special character or profession.

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They are these: "He is a runaway. He broke out of the jail in New England, and fled from justice."

The words charged in the third count are unquestionably actionable. But I maintain that, upon established principles, no action can be sustained upon either of the sets of words in the other counts.

The general rule, as to what words are actionable, is very distinctly laid down by Lord Chief Justice De Grey, in *Anslow v. Horne*, 3 Wils. 186:

"The first rule is, that the words must contain an express imputation of some crime liable to punishment. Some capital offense, or other infamous crime or misdemeanor, and the charge upon the person spoken of, must be precise."

70] \*"The second general rule is, that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office; or when spoken of persons *touching their respective professions, trades, and business*, and do or may probably tend to their damage."

Courts universally agree in recognizing the validity and correctness of these rules. Of the first, in *McClurg v. Ross*, 5 Binney, 219, Chief Justice Tilghman says: "I will not say that the cases to be found on this point are in perfect unison. But from a full consideration of them, I think myself warranted in laying it down, that (with certain exceptions as to persons in office, special damage, etc.) words are not actionable unless they contain a plain imputation of some crime liable to punishment. Such was my opinion in the case of *Shaeffer v. Kintzer*, 1 Binney, 542, and I have found no reason for altering it."

The Court of Appeals of Kentucky, 2 Bibb, 473, after examining the cases in the English books, say: "The rule, therefore, evidently deducible from the whole of the adjudged cases, is, that words to be actionable must charge an offense subject to corporeal or other infamous punishment." The same doctrine is held in the same book, page 319, and in *Hardin*, 529.

None of the words charged in the declaration are actionable within this rule. Indeed, the declaration is not predicated upon the principle that the tendency of the words is to subject the plaintiff to punishment. It proceeds altogether upon the rule, that the words are actionable, because spoken "touching his profes-

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sion," and tend "*to destroy his practice as a lawyer, and to harass, oppress, and impoverish him.*"

Words to be actionable within the second rule, must be spoken "*touching the profession.*" Though the tendency of the words may be to injure a man in his professional pursuits, they are not actionable unless spoken in reference to, or, in the words of Chief Justice De Grey, *touching that profession.*

In *Hutton v. Beech*, Cro. Jas. 339, it was alleged that the plaintiff was constable and church-warden, and by reason of those offices, expended divers sums of money for the use of the inhabitants. The defendant said of him: "Thou hast beguiled and deceived the town, upon thy accounts, of four pounds, and it is no marvel thou growest rich, when thou deceivest the town." Adjudged not actionable, because the action was not in point of office.

Brunkard's case, Cro. Jas. 427, charged that the plaintiff was \*one of the privy chamber of the king; and defendant said: [71 "Thou art a cozening knave and livest by cozening." Held not actionable.

In *Willis v. Shephard*, Cro. Jas. 619, plaintiff alleged that he was steward of Lord Arundle's courts in the county of Dorset; that he was parishioner of Gillingham, and church-warden there, and had received one hundred pounds by virtue of his office, and made a just account; that he was collector of the poor, and received money as such, and made a just account; that he was feoffee of lands for the parish, and received and accounted for money; that he was steward of the king of the manor of Gillingham, and received and accounted for money. And defendant, speaking of him and of his offices, said: "Charles Willis is a notorious liar and a cozenor, and hath deceived and cozened the parishioners of Gillingham of five hundred pounds, and he will teach thee to cozen me of my house." And because they "were not such words whereof the law takes cognizance nor to his loss of life or goods, or otherwise to touch him in his profession," these words were adjudged not actionable, after an inquiry of damages upon *nil dicet*.

In *Tod v. Hastings*, 2 Saund. 307, the plaintiff alleged that he was a draper, and got his living by buying and selling clothes and other merchandise; and defendant said of him, "You are a cheating fellow, and keep a false book, and I will prove it." It was objected in arrest of judgment, that it was not averred in the declaration that the words were spoken in relation to the plaintiff's buying



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and selling, and therefore *did not touch him in his trade*; and the whole court were of that opinion and arrested the judgment.

The note upon this case asserts that the declaration must aver that the words were spoken of the particular profession, and that at the trial the plaintiff must prove "that the words were spoken of him in relation to his profession, office, or trade, according to such allegation, otherwise he will fail in his action and be nonsuited." Sir T. Ray. 75; 6 Mod. 202; 2 Salk. 696, are cited. Many other authorities are referred to in Salkeld. I will only add *Ld. Ray. 1417*.

The authority of these cases has been recognized by the Court of Appeals of Kentucky. *Mills v. Taylor*, 3 Bibb, 469. The words charged to have been spoken in this case are as follows: "You are a damned rogue and a swindler; you say you were authorized by Price and M'Cutchin, of Philadelphia, to draw bills on them, and if you have any letters from them, you forged them. I can prove you are a damned rogue and a swindler. I can prove you never had a letter from Price and M'Cutchin, to authorize you 72] \*to draw bills on them. You are a damned refugee from Canada, and you came from Canada to swindle the people of Kentucky out of their property." Of these words the court say: "They are not charged in the declaration to have been spoken of the plaintiff in relation to his trade; and it is a settled rule, where words are not actionable in themselves, but are so only because they are spoken of a person in his profession, office, or trade, they must be alleged in the declaration to have been spoken of him in relation to such, his profession, office, or trade, otherwise the declaration will contain no cause of action."

All these authorities are full and conclusive to the point, that the last count in the declaration is defective. It contains no suggestion that the words were spoken in relation to the plaintiff in his profession; that profession is not even named in the colloquium. This lays a sufficient ground for arresting the judgment. But I maintain further, that the principle fairly deducible from these authorities, when applied to the case before us, demonstrates that no action can be sustained upon any other than the third count.

It is clear that the words in the first, second, fourth, fifth, and sixth counts are not actionable in themselves. And it is also clear, that although charged to be spoken of the plaintiff, and of his profession and standing as an attorney and counselor, he can have no

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action against the speaker, unless they relate to or touch his profession.

In *Foot v. Brown*, 8 Johns. 64, the suit was brought for saying of the plaintiff, an attorney, "Foot knows nothing about the suit, and he will lead you on until he has undone you." After verdict for the plaintiff, and upon a motion in arrest, the counsel for the defendant asserted that "the cases in which it has been held that an action lies for words reflecting disgrace on a man in his trade or profession, may be divided into three classes: 1. Where the words charge the person with a want of fidelity or integrity in his trade or profession generally, as to say of a lawyer, he is a common barrator. 2. Where the words charge a person with dishonesty, corruption, or want of integrity, in a particular case. 3. Where the words impute ignorance or want of skill in general terms." The court recognized the correctness of these positions and arrested the judgment, and I think the soundness of the opinion can not be successfully controverted.

All the cases agree that the words spoken must relate to or touch the profession. It is not enough that the profession be the subject of conversation, nor that the words reflect upon the general character of the party. Their tendency must be to affect directly professional skill or professional integrity, otherwise they are not actionable.

This action is not given to professional men and to tradesmen for the purpose of extending to them and to their characters a higher protection than is secured to other citizens; but for the purpose of affording equal security to all. He who follows a profession or trade for a living, may be assailed by defamation in that profession or trade. He is, therefore, exposed to an attack to which men engaged in no particular pursuit are not vulnerable. When he is thus attacked, this action is given as a means of redress. But he can no more sue it for terms of general obloquy and reproach applied to him as a citizen, than if he did not follow a profession or trade.

The words, to be actionable upon this ground, must have an appropriate application to the profession or trade of the party of whom they are spoken. The same set of words spoken of a lawyer, a physician, or a merchant can not give an action to each; for they can not touch the profession of all, however they may alike affect their general reputation as men. To say of a physi-

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cian, that he is a bankrupt, a cheat, a swindler, and a fomentor of strife and litigation, would not be actionable, because none of these things touch his skill or conduct as a physician. Yet for the three first a merchant could have an action; and if spoken of a lawyer, all but the first would be actionable.

Habitual intoxication progressively disqualifies a man for the pursuit of any profession or trade. Yet to say of a lawyer, physician, or merchant, that he is a drunkard, is not actionable. Were it a fact, it does not directly touch his integrity or skill in his business. But to say of a clergyman that he is a drunkard, is actionable; because if it be true, the congregation or other authority by which he was constituted, would, for that offense, degrade him from his office.

In the case of Dr. Blodget, tried at the Supreme Court in Dayton, June, 1823, before Judges Pease and Burnet, the declaration charged the words to have been spoken of the plaintiff in his professional character; and the words set out imputed to the plaintiff such a habit of intoxication, that, in consequence of it, his business as a physician was declining. Upon the principles here stated, the court charged the jury that the words were not actionable, and there was a verdict for the defendant.

This decision is in strict conformity with the cases I have cited, 74] \*and with the cases generally as found in the books. There is, in Comyn's Digest, title Action upon the Case for Defamation, an extensive collection of words upon which the different descriptions of actions can be sustained. Those which relate to a counselor are collected under D. 22 and D. 24. With a single exception, they relate directly to the profession. One case is cited from 1 Roll. 55, in which the words "he hath the falling sickness" were held actionable. The reason given is, "for that disables him in his profession." It is evident that this case can not be law. The imputation for which the action is given, must be of something reprehensible in the individual conduct and demeanor of the party. To attribute to him a disease proceeding from no act of his own, and attaching to him nothing immoral or discreditable, and operating only partially to affect his capacity, can not be actionable. If actionable of an attorney, the same imputation cast upon every man of business must be actionable, and must extend to various other diseases besides that named. The charge of drunkenness presents a much stronger case.

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I assume, then, the rule to be, that words to be actionable, because spoken of an attorney and counselor at law, must be spoken of his professional character and conduct, and must be of such description as directly to touch that professional character and conduct. If the words themselves be not of this description and character, no finding of a jury or explanation by innuendo can make them actionable. I will proceed to examine the different sets of words contained in the declaration, by the application of this rule.

"He fled his country to escape from justice, and disguises himself under a borrowed name. He is unfit to be trusted."

These words touch not the skill or information of the party. If they be actionable, it is because they reflect generally upon his professional conduct; and it is most evident that they can not, and do not, relate to any act that was or could be done by the plaintiff in his profession as an attorney or counselor. The misconduct imputed to the plaintiff is not an abuse or neglect of any professional trust or employment, but the doing of an act inconsistent with his duty as a good citizen, and which is just as reprehensible in any other citizen as in an attorney. The act charged to have been done, is not one which his profession put it in his power to commit, or with which his profession could have any possible connection. Any man, with or without trade or profession, could do the same act. It would be as discreditable in a tailor as in an attorney. \*The imputation, if false, would injure all men [75 seeking employment from others alike. The day laborer, in proportion to his wants and his wages, would feel it as sensibly as a counselor at law; and if one man can have an action for these words, every man ought to have it. The justice of this argument is strongly enforced by the very facts of this case. It is notorious that the plaintiff was not admitted an attorney and counselor at the time the words charge him with committing the facts. How can words touch his professional character and conduct, which speak of facts done before that character commenced?

Possibly the last clause in this count, "He is unfit to be trusted," might be held actionable in itself. It is not necessary to examine this point, because there is nothing of this kind in the second count.

"He is of infamous character. He broke jail in New England and fled from justice."

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The first clause in this set of words does not import that the plaintiff was of infamous character in his profession. It is a general charge against him as a man, that his character was infamous. Now the general character of a man may be infamous, and yet he may discharge professional duties with integrity and ability. The fact that a lawyer pays little regard to principles of right and wrong, does not affect his practice and business, if he be looked upon as a man that will not betray his professional trusts. If it were said that his conduct as an attorney was infamous, or that his professional character was infamous, the words would touch his profession, and might affect his practice. But a general allegation of infamous character stands upon different ground. There is no more reason why a lawyer should have an action for these words, spoken of him generally, than that every citizen should have an action for the same words.

It may be thought that the distinction I take is too refined and unsubstantial: and it may be said that if a man be of infamous character, that infamy must attach to him in everything he is concerned with. A proper attention to the cases decided, and to the principles upon which the decisions stand, will show that I am right. It were idle waste of time and labor to require in the declaration an allegation that the words were spoken in reference to the profession, and to require proof that the words were so spoken, upon the trial, if the action could be sustained upon words of opprobrium spoken in reference to the general character of the man only—words which, in their natural interpretation, refer to 76] general individual \*conduct, and not to professional acts. A man may be an open profligate with regard to women, and may spend his nights in stews and brothels—he may be a contemner of all religion, a profane swearer, and open violator of the Sabbath. In all these particulars he may be deemed of infamous character, yet in the profession either of law or medicine, he may be in the highest degree intelligent, diligent, and upright. If an action may be sustained by a lawyer, for saying of him that he is of infamous character, every tradesman, merchant, and person in office must have an action for the same words. Thus the rule of law, that the words must touch a man in his peculiar profession, is subverted, and a new principle is introduced, by which terms of general reproach are made actionable, in all cases, when spoken of professional men, tradesmen, and officers. It will, then, no longer be

necessary to allege or prove that words were spoken of the particular business of the party. It will be enough to set out that the plaintiff followed a profession or trade, and that the words were spoken of him generally. The decisions upon this point, as I have shown, are uniform, and it seems clear that they proceed upon the position that an action can not be maintained unless the words, in their plain and natural import, apply to, touch, and affect the plaintiff's professional conduct and character.

The words in the fourth, fifth, and sixth counts are less strong than those upon which I have been commenting, and can not be actionable unless made so in consequence of being spoken of a candidate for office.

The plaintiff alleges that he was a candidate for the office of prosecuting attorney, and that defendant, in reference both to his profession and to the appointment, said: "He is a man of immoral character. He broke jail in his own country and fled from justice. He is destitute of character. He broke jail in New England and fled to escape the lash of the law, and now wears a borrowed name.. It won't do to appoint such a man. He is of bad character. A man that broke jail and fled from justice, is unfit for a ny office.

Not one of these sets of words naturally import that they were spoken of the plaintiff's professional character. They contain no imputation that the plaintiff was ignorant of his profession, or unfaithful in professional conduct. His profession or professional character is not named. The words are spoken of him generally as a man, not particularly as an attorney and counselor at law. It won't do to appoint him. Not, however, because he is not a lawyer, or because confidence can not be reposed in his professional integrity, \*but because he is a man of bad character, that [77 broke jail and fled from justice. This, if true, could not touch him in his profession, otherwise than indirectly, as any other charge of immorality or bad conduct might affect him, and is therefore no foundation for an action.

I do not see that the plaintiff's case is strengthened or varied by the fact that he was a candidate for the office of prosecutor. Words not actionable in themselves, do not become so when spoken of a candidate for office, unless they have the effect of preventing him from obtaining the office. Nothing of this kind is alleged. The fact that he was a candidate might be material to show the

circumstances under which the words were spoken, but it can have no bearing upon the character of the words themselves. They must be actionable independent of that fact, or they are not actionable at all.

The PLAINTIFF himself submitted an argument in support of the action and against the motion in arrest. He suggested, first, that the seventh count was actually abandoned at the trial; and upon that point presented an affidavit, and the following remarks:

The plaintiff, in the first place, submits to the court, whether their honors, Judges Pease and Hitchcock, who tried the cause, or even the court in bank, can not amend the record so far as to direct the seventh count to be *stricken out*. Indeed, it is a question whether the *abandonment* of a count has any place in the record. The count is withdrawn and the record stands as if no such count had ever belonged to the declaration; surely, then, no record of the abandonment need be made. Suppose, also, the clerk had neglected to enter the verdict, or had entered it wrong, could not the court, being acquainted by their own observation of the fact, correct the mistake of the clerk? The court are not sitting in *bank* as an *appellate court*; the *record* of every cause—for they have none but their own causes—is as much under their inspection and control now as it was at the proper county. Whether the seventh count was abandoned or not, is not a fact to be *litigated*. What object is there to be effected or arrived at by sending the cause to Jefferson county to correct that which the court know to be true, and which could not there be controverted. Mr. Leavitt's affidavit can not be disputed by negative testimony, even if the court should not distinctly recollect the abandonment.

I think I am entitled to some consideration on this point; the cause has been years in court, and was never continued, either before or since the trial, at my instance, but always against my wishes. It was taken under advisement in 1822 on motion for new trial and in arrest—the motion for a new trial was overruled at Columbus last year, and the motion in arrest continued to the last term in Jefferson county. At that term the defendant had leave to amend his motion by inserting all the counts, having only made his motion apply originally to the third, fourth, fifth, and sixth counts, not including the most deficient one, as he now contends, because he well knew it had been abandoned. I knew not

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but the *abandonment* was entered in the journals, or the more correct course pursued by the withdrawal of the seventh count, until I saw the defendant's argument a few days before I left home for Columbus, in November last. I would by no means be considered in these remarks as complaining of the court, but merely showing why I think this cause ought to be no further delayed to my injury.

If the court make a final decision of the cause at this time, should that decision render the question a legitimate one, I would ask the court to consider, whether the struck jury was not requisite in the cause, and that they would make an order on the subject of *their charges* as allowed by the statute relating to juries.

Upon the merits the plaintiff presented the following:

In the absence of my counsel, who was expected to attend at Columbus during the court's sitting in bank, I can not even attempt an argument, not having bestowed any attention whatever on the questions arising under the motion in arrest, and having at the present scarcely a moment's time to spare from public duties. I will, however, suggest a few considerations to the court which presented themselves to my mind on reading the argument of the defendant's counsel.

In the first place, the decisions or *dicta* of courts, in actions for words touching one's *official* character, ought to be laid aside—they can have no connection with the doctrines that govern the action in the shape it assumes in this cause.

"The second general rule," as quoted by the defendant's counsel from 3 Wilson, 186 (to which authority as well as to all others by him cited, I can not now refer), is unquestionably agreeable to the current of authorities; "that words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office, or when spoken of persons touching their respective professions, trades, and business, and do or *may probably tend* to their damage." On this principle it seems no difference of opinion could exist between any two gentlemen of the profession, as to [79] its application to the words contained in the six first counts of the declaration. The declaration alleges that the words were spoken by defendant "*of and concerning the profession and character of the plaintiff as an attorney and counselor at law.*" The jury have found this allegation to be true. But the counsel for



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the defendant answers, that although these words were spoken of *and concerning* the plaintiff as an attorney and counselor, yet they "are not such words as naturally import that they were spoken of his professional character;" or, in other language, they are not in themselves such words as the court will construe to be actionable when spoken of the profession of the law. So that were A. B. to say to E. D., who is a practicing lawyer, "You, sir, as a lawyer, broke jail, and fled from justice, and now wear a borrowed name," he would not be liable in an action for words, because "the misconduct imputed to the plaintiff is not an abuse or neglect of any professional trust or employment, but the doing of an act inconsistent with his duty as a good citizen, and which is just as reprehensible in any other citizen as an attorney. The act charged to have been done is not one which *his profession put it in his power to commit*, or with which his profession could have any possible connection." The jury say the words were spoken of, and concerning the plaintiff's profession and character as an attorney. But the court are called upon to say *it's not true*; because the words themselves do not technically convey an idea of an act *professionally done*. The result of this doctrine is this, that a man having been admitted to the practice in this state, may be charged with all the crimes and offenses known to our law, or to our system of ethics, and if the charge does not in itself convey the idea that the act done, or the defection of principle, necessarily or entirely rose out of, or attaches to his professional conduct, no action lies. A member of the profession is like a *scissors-grinder* or *bellows-mender*; if he can sharpen a knife, or make the bellows blow a good blast, it is all that is requisite to gain business, and make a profit in his profession: an argument might not ever be better suited to a client and his cause; nevertheless I do not believe it to be the law of the land.

In truth the argument of defendant's counsel is wholly dependent upon this doctrine, that the profession of the law is the mere business of the *head, the tongue, and the pen*; that the *heart*, the soul, and the good feelings of human nature have nothing to do with it. That he may be a beast, a brute, a scoundrel, a liar, a profane swearer—all these and even more, and yet be an "*upright*" lawyer. If such

80] \*ideas are entertained by any enlightened gentleman in this country, I desire he may not be discovered among my friends. Our statute law admits no man to an examination for admission to prac-

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tice law, unless he produces a certificate of his *good moral character*;" and yet the counsel says *moral* character has nothing to do with a *lawyer's* character. Such an idea may flow from the crudities of the common law, but not from common sense.

In the case in 8 Johns. 64, the doctrine which the counsel relies upon, is in brief this: that a charge of want of fidelity, want of honesty, or want of skill in the profession is actionable, agreed. And will not this support the verdict of the jury in the present cause? So, also, the case cited from Bibb; the language used by defendant in that case was less strong than that used in this. Yet it seems the court would have had no doubt of sustaining the verdict in that case, if the words had been charged as spoken of *plaintiff in his profession*.

It is said that these words, in the second count, "he is of infamous character," do not import that the plaintiff was of infamous character *in his profession*. The declaration states that these words were spoken of the plaintiff, and *of and concerning his profession and standing as an attorney and counselor at law*." I know not how to understand the counsel; would he have the pleader say, that "the defendant spoke and published these words *of and concerning the profession* of the plaintiff—that he was of infamous *professional* character?" Such is the doctrine he advances, because as the words "infamous character" do not *import* in themselves that a man is *professionally* infamous, they can not be spoken "of and concerning a man's profession" so as to be actionable, unless the speaker conjoins to the word *infamous* the word designating his profession; so that the most bitter tongue of slander could play until it had no further power or motion, and not only endamage, but destroy a fair professional reputation, without subjecting its possessor to an action of slander.

A reflection is here excited which often involuntarily and almost imperceptibly arrests the career of the mind when pursuing a course of technical reasoning. How wide is the difference between a legitimate argument upon *truth and fact*, and an argument built upon deductions *technically* drawn from such truth and fact. The one is the production of logic, to the other I give no name. In the declaration under examination, it is alleged that the plaintiff was an attorney and counselor at law—that the defendant, contriving and maliciously intending to injure the plaintiff in his good name and *professional* character, spoke and published of and concerning the

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81] \*said plaintiff, and of and concerning his said profession and standing as an attorney and counselor at law, "he is of infamous character." In what, and as to what? In his character as an attorney and counselor, and as to his profession and standing as such attorney and counselor. This is the response which the jury have given, and it is therefore beyond contradiction. Can sound logic, common sense, or right reason, give any other construction to this allegation of the declaration and the finding of the jury, than that the slander was "*touching* the plaintiff's professional character?"

But another important consideration deserves the attention of the court. An attorney in this country depends very much for his professional emoluments on the reputation which he bears, not only as to moral character, but as to his *safe pecuniary standing*. And whatever technical disguise may envelope the real motive and truth of the matter, it is known to all men of observation, whether learned in the law, divinity, or physic, or not learned at all, that the reputation of not being punctual in paying over money—of not being morally honest—of not being of fair unimpeachable standing in the community—will either of them sink an attorney's business, and perhaps make him a beggar.

It is true the inducement in the fourth, fifth, and sixth counts, relative to the plaintiff's being a candidate for the appointment of prosecuting attorney, was not inserted on account of the failure of the plaintiff to obtain that appointment. He never *sought* that appointment, and felt not even a regret that another more worthy was preferred. But he would have evinced an apathy of feeling belonging only to him who has a character with which "*suspicion*" *does* "*affiliate*," had he permitted the foul defamation to rob him of his professional reputation, and to make him "*poor indeed*," without an attempt to repel. This inducement was inserted to show more directly that the slander *touched his profession*. The appointment was of a professional nature, and if the doctrine be correct that a lawyer may be "*intelligent, diligent, and upright in the highest degree in his profession*," and yet "*be deemed of infamous character*," where was the object of the learned judge, the defendant, in using the language he did, at the time he did; and what means the finding of the jury! Here are absurdities and contradictions opposed by the truth of the case and the common sense of mankind, as well

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as sound legal principles, too glaring to cause the mind even to hesitate.

But I submit to the court whether the declaration, stripped of all the inducement and colloquium, does not contain actionable words \*sufficient to support the declaration, even in the *last count*, [82 which was abandoned.

The words charged in the most exceptionable counts are, "he broke jail and fled from justice."

The breaking of jail in itself is a crime in almost all countries in christendom; and although the crime is charged as having been committed in a foreign country, the words are still actionable.

But the being a "fugitive from justice," subjects every man to arrest by the law of the United States, and on the governor's warrant he may at any time be apprehended and conveyed in chains to the jurisdiction from whence he escaped. I should like to be informed if there be an authority in all the reports in England from the Year-Books down to Maule and Selwyn; or in this country from the earliest decision to be found in Dallas, down to the latest in Johnson, that will protect the slanderer in charging an innocent man with being a "fugitive from justice!"

From some *law memoranda* I have in my pocket-book, I make the following references.

What is the use of a *colloquium*? It is to point such words to the plaintiff or his profession as do not of themselves naturally and necessarily apply to the plaintiff or his profession. *C. Gidney v. Blake*, 11 Johns. 54; *Cave v. Shelor*, 2 Mun. 193; *Lindsey v. Smith*, 7 Johns. 359; and in the case of *Foot v. Brown*, 8 Johns. 64, cited by defendant's counsel, I have a note which says, the law gives an action for words that affects a man's *credit* in his profession. Breach of prison, see 4 Bl. Com. 130, on words being actionable which charge a crime committed in a foreign jurisdiction, or where the statute of limitations bars a prosecution, see *Van Ankin v. Westfall*, 14 Johns. 234.

The court were unanimously of opinion that the seventh count was bad. Judges Pease and Hitchcock were of opinion that all the other six counts were good. Judges Burnet and Sherman were of a different opinion as to some of the counts. The court, therefore, being equally divided on the motion in arrest, it failed;

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and the cause was certified back to Jefferson county, that examination might be had as to the abandonment of the seventh count. If the fact of abandonment is made out, judgment to be entered for the plaintiff on the verdict—otherwise, judgment arrested.†

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## \*ASPINWALL v. WILLIAMS AND OTHERS.

Articles of agreement for constituting a partnership, assigning to each party the performance of certain things to put the business to be carried on into operation, constitutes a partnership immediately, not from the commencement of the business itself.

Where the articles of copartnership do not fix the name of the firm, and a contract is made by one partner for the joint account, a note executed by one for the whole, in the name of himself & Co., is binding on all.

THIS cause was tried before the Supreme Court of Hamilton county, at May term, 1823, and a verdict rendered for the defendant. A motion was made for a new trial and reserved for decision upon a case stated, at the special session in Columbus.

The substance of the case is as follows: On the 31st of July, 1818,

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83] \*†NOTE BY THE REPORTER.—The proceedings at the trial of this cause are abstracted from minutes of the trial published by the plaintiff. The account of the argument upon the motion for a new trial is taken from a copy of the defendant's brief, as furnished by himself.

In charging the jury, the court are made to say "that words, although not actionable in themselves, may become so when spoken of a man in his professional or official character, if they impute to him dishonesty, want of skill, or any other matter that renders him unfit for the profession or occupation which he fills."

It is possible that these latter terms may be understood by the profession to embrace much more than the judges intended. To prevent any misconceptions on this point, the reporter subjoins, from his own notes, the following case, decided at Dayton, June term, 1823, by Judges Pease and Burnet:

## ANONYMOUS.

The action was brought for saying of the plaintiff, "He can not get business any more. He is so steady drunk that he can not do business any more. The people will not employ him." The declaration contained the proper averments that the plaintiff was a physician, and obtained his living by the

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the defendants entered into contract, of which they made a memorandum in writing, in the following words:

"Memorandum of an agreement made and entered into this thirty-first day of July, one thousand eight hundred and eighteen, between Jacob Williams, of Mill Creek township, Hamilton county, State of Ohio, on the first part, and Benjamin Gardner, Jr., and William Chase, of Newport, State of Rhode Island, on the second part, witnesseth, that the said Jacob Williams, Benjamin Gardner, Jr., and William Chase, do agree to erect and build a distillery

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pursuit of his profession, and that the words were spoken of the plaintiff's professional conduct, capacity, business, etc.

Upon the trial of the cause, the speaking of the words being fully proven, the counsel for the defendant urged to the jury that the words were not actionable, because they did not touch the professional skill and capacity of the plaintiff, nor his professional integrity; that if it were actionable to say of a physician that he was drunk, or steady drunk, every individual ought to have an action for the same words, which would be subverting the foundation upon which actions for words now rested, and opening a new and most mischievous source of litigation.

The counsel for the plaintiff resisted these arguments and interferences with great labor and ability, but the court coincided substantially with the defendant's counsel in the points made by them, and charged the jury that the words were not actionable. The defendant had a verdict. The plaintiff's counsel moved for a new trial, but did not argue or press the motion.

The following case, decided by Judges Pease and Brown, at Belmont, 1818, may also serve to show something of the opinions of the judges in respect to the action for words:

BARRET v. JARVIS.

The declaration in this case charged that the defendant, with the intent of causing the plaintiff to be considered a mulatto, and a relation of negroes, and thereby to cause him and his family to be excluded from the society of white people, and denied the right of suffrage, spoke of the plaintiff, and of his daughter Polly, to one Z. M., these words: "I understand that you are going to marry Barret's daughter; I am sorry you should, for they are akin to negroes." The defendant pleaded two pleas: first, that he spoke the words as a report, and named his author at the time; second, a justification. Upon both these pleas, issues were joined. A verdict was found for the plaintiff—\$75 damages. A motion was made in arrest of judgment, upon the general ground that the words were not actionable. The court of common pleas, consisting of Judge Tappan and his associates, arrested the judgment. A writ of error was brought by the plaintiff to the Supreme Court, and the judgment of arrest was affirmed.

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for the distillation of grain, jointly to share and share alike the cost of said establishment, to be erected on the ground of said Williams, near where he now resides. Now the conditions of this agreement are such, that the said Williams does, for himself, his heirs, and assigns, agree to lease for the occupation of said establishment, a certain lot of ground, not to exceed more than two, or be less than one and one-half acres of land, through which there is a running stream of water, for the sole use of said establishment, or those interested therein; this lease to continue for the full term and time of fifteen years, to commence from the time of signing these instruments: and for his part doth further covenant and agree to erect the necessary buildings in order to go into the operation, to commence thereon immediately; the said Gardner and Chase do on their part agree to provide the stills and worms of said establishment. It is further understood that a store of goods shall be established, to be furnished by said Gardner and Chase; and after the establishment shall be completed, the goods and stills on the spot, an equal proportionate of the amount paid by each shall take place, and a full adjustment be made. The whole establishment, goods, etc., etc., is to be equally owned by us three. The said Gardner to manage all things appertaining to the 85] distillery inward, and \*the said Chase all that concerns the outdoor business of the establishment; the said Williams to be consulted in all things, and his advice always to have due weight. Further, we, the said Jacob Williams, Benjamin Gardner, Jr., and William Chase, do by these presents bind ourselves, our heirs, and assigns, for the full and faithful performance of the above obligations; and should either of the parties feel disposed to sell or dispose of their interest therein, the remaining parties shall have the offer to buy out; and after the expiration of the lease, it shall be at the option of the said Williams to continue, or sell out; and that a settlement of all accounts shall take place quarterly, or half yearly. Respecting the purchase of grain, it is understood that whatever purchases each of the parties may make, it is to be binding on all the parties, or that what sales of whisky or gin each one may effect, the other parties are to comply with."

Received five hundred dollars, in full for all damages, costs, and debts, and especially for all damages on or respecting this article.

JACOB WILLIAMS.

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After the making of this contract, the defendant, Chase, proceeded to New York with letters from merchants in Cincinnati, stating the character and responsibility of the defendant, Williams, upon the credit of which the plaintiff sold him a quantity of merchandise, and took a note for the amount executed by Chase in the name of William Chase & Co. Upon this note the action is brought. It was admitted that Williams knew nothing of Chase carrying letters recommending his credit, to New York. It was also admitted that none of the goods came to the use of Williams, and that the business of distilling was never commenced between the parties.

HAMMOND, for the plaintiff.

It is insisted that the contract constituted an entire and complete partnership from the moment of its execution, and that the stipulations as to what shall be done by the different parties for carrying the partnership into effect, and setting it in operation, are nothing more than agreements what part each shall perform upon the partnership account.

On the other hand, the defendant, Williams, insists that the agreement does not constitute an immediate partnership; that it is nothing but a contract to commence a partnership hereafter, upon the performance by the respective parties of particular things which they covenant to perform—that these things not being performed, no partnership ever existed. This interpretation of the agreement appears to me untenable for various reasons.

The first stipulation is in the present tense; the parties “do agree to erect and build a *distillery* for the distillation of grain, jointly to share and share alike the cost of said establishment.” A distillery, when erected, consists not merely of the house, but it consists also of the stills placed in furnaces, worms in their proper vessels, troughs, tubs, etc.—including everything necessary to carry on the process of distillation from grain. The agreement to erect and build a distillery necessarily includes the preparation, in their proper places, of everything essential to the establishment. This the parties agree to do *jointly*—and they add, so as to leave no ground for misapprehension, that they are “to share and share alike the cost of said *establishment*.” The term *establishment* fully explains the proper interpretation of the term *distillery* before used, as I claim it must be understood.



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It seems clear to me that here is a present partnership established for the erection of the distillery, and that every act done toward effecting that object, must be done upon the partnership account. After having thus created the partnership, the members agree between themselves that Williams shall erect the buildings, and that Gardner and Chase shall provide the stills and worms. The *distillery*, the *establishment*, includes all these, and that is to be erected or built jointly. Williams, in erecting the buildings, must act for the company—Gardner and Chase, in providing stills and worms, must act for the company; thus every act done by either party, in completion of this part of the agreement, must have been an act performed for the account and advantage of the company, for which the company must be responsible. Had Williams employed hands to furnish materials, or mechanics to erect the buildings, would the law permit Gardner and Chase to say: True, this work was to be done by Williams and ourselves jointly; we were to share and share alike the cost, and what has been done is for our benefit, yet Williams agreed with us to do this for his part—you made your contract with Williams, and you must look to him for compensation. It is most certain that the law would not permit Gardner and Chase, in the case stated, to hold this language. Had Gardner and Chase purchased stills and worms for the establishment, could Williams be permitted to say: I am not responsible for the price. To be sure they constitute part of the 87] distillery to be erected and built jointly; \*the articles of co-partnership give me a right of property in them; but Gardner and Chase were to provide them, and they alone are legally bound to make payment. This surely could not be permitted. Is the case of the purchase of the store in any respect essentially different?

“It is further understood that a store of goods shall be established, to be furnished by said Gardner and Chase; and after the said establishment shall be completed, the goods and stills on the spot, an equal proportionate of the amount paid by each shall take place, and full adjustment be made, the whole establishment, goods, etc., to be equally owned by us three.”

Can there be any serious difficulty in giving a just interpretation to this provision? I can see none. The establishment shall include a store of goods which shall be furnished by Gardner and Chase; when furnished, it shall be equally owned by the three part-

ners. What sum of money, of their own property, Gardner and Chase shall have expended in furnishing the goods, and in providing the stills and worms, and what sum of money Williams shall have expended of his own property in erecting the buildings, shall be apportioned to each—the accounts shall be adjusted—but no matter what the relative proportion may be, the whole shall be a company concern, and each shall own an equal interest without regard to his individual expenditure. This certainly is the legal interpretation of the contract.

The defendant, I am informed relies much upon the case of *Saville v. Robertson* and another, 4 Term, 720. This case, as I think, is not in point for him. The judges differ in opinion, which weakens its authority. But it is distinguishable from this case in all its important bearings.

In the first place, it is decided that there was a partnership in regard to the ship, and, in this particular alone, the case resembles ours. With respect to the cargo, each party was to be interested according to the amount of cargo furnished by him. This is not our case. The parties are to be equally interested, no matter what amount is furnished by each. When the extent of interest depends upon the amount of capital furnished, it is impossible to say that the partnership can be bound for contracts to supply that capital. Each individual partner must be regarded as contracting to procure his own share of the capital. But when the interest is to be equal, without reference to the amount furnished by each, it is very natural to infer that each makes his purchases for the whole. He can have no inducement to involve himself, [88 because the only consequence is to make himself a creditor of the company. Third persons can have no inducements to credit him—for if he advance four-fifths of the whole capital, where there are partners, except as to one-third, he is only loaning money to his copartners.

In this case of *Saville*, the supplementary agreement of 23th July, 1787, expresses distinctly the understanding of the parties that they are not to have any interest in the amount furnished by each other, and that they are not to be separately liable for the advances of each other. This is not like our case, because with us all are equally bound to do part, and all are to receive equal proportions of the aggregate property. There is a joint interest in everything as it is brought into the use of the company, no matter by

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whom supplied; and this of itself creates a joint responsibility. See Watson on Partnerships, 5-25; Com. on Contracts, 286, 300; 1 Camp. 185, 329.

In *Saville v Robertson et al.*, Lord Kenyon says, "It is clear that if all these parties had been partners at the time when the goods were furnished, though that circumstance was not known to the plaintiffs, they would all have been liable for the value of the goods"—725. Now it is clear that in our case the parties were partners for creating a distillery establishment—and that a store of goods, according to the articles of copartnership, was to constitute a part of that establishment, in which all the parties were to be equally interested. If such store of goods be purchased by one partner upon the credit of the whole, surely the whole, who were to share and share alike in the amount, ought to be responsible for the cost.

In the case of *Saville*, the copper purchased to repair the ship was held to be chargeable to the company, because the company were alike interested in the ship. But the copper purchased as an adventure was not allowed to be charged upon the company, because they had no interest in the purchase, and in no event could derive advantage from it. And besides it was purchased upon the individual credit of Pearce. In our case the goods were purchased upon the credit of Williams, and had Chase acted honestly, Williams might have derived benefit from them. The circumstances under which the purchase was made constituted Williams part owner of the goods. If loss is sustained by the knavish conduct of Chase, Williams ought to bear it, rather than the plaintiff. Williams trusted Chase, and gave him credit; the plaintiff trusted 89] \*Williams not Chase. It was by receiving Chase as a partner that Williams enabled Chase to impose upon the plaintiff, and it was by the interest acquired in the goods by virtue of the partnership that Chase was enabled to sell them so as to divest the title and ownership of Williams.

Williams' receipt on the article recognizes a liability for *costs and debts*. Now no liability for *debts* could exist if the copartnership had never commenced. Damages might have been sustained in consequence of the other parties not perfecting the copartnership, but *debts* could not have been incurred. This receipt is therefore an acknowledgment by Williams that the partnership had existed and had incurred *debts*—and this acknowledgment settles the

question, unless it is shown to have been made under a mistake of the parties' rights.

If a partnership exist, and one member be sent to make purchases for the partnership account, with instructions to make such purchases as if for himself, the company are nevertheless liable, if the company receive the articles purchased. It is not permitted to a partnership actually to receive goods for their own use, and shift the pecuniary responsibility upon an individual member. In this case, after the article of agreement to erect a distillery jointly and to share and share alike the cost, a subsequent provision that Williams should build the house, and Gardner and Chase provide the stills, could not, in respect to strangers, change their joint liability.

Whatever they agree to do jointly, to supply jointly, and to own jointly, they must jointly pay for, no matter on whose credit it may be supplied. In the case of Saville, the copper to repair the vessel appears to have been furnished as entirely on the credit of Pearce as the copper for exportation; yet the company was held liable because they were jointly bound to fit out the vessel. For the copper furnished for exportation they were not held liable, because they had no interest, and could have no interest in it.

The plain letter of the contract, and the conduct of all the parties, alike contradict the position of the defendant. If it were a case in which each party agreed to furnish certain sums of money, or specific articles, to create a foundation whereon an association should be afterward erected, no partnership cost or debt could arise; nothing of this kind could exist to be satisfied by pecuniary compensation. Williams' receipt, therefore, most strongly confirms and corroborates the natural and obvious interpretation of the terms used in the contract.

\*CORY for defendant:

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We contend that the articles of agreement prove no actual existing partnership between the defendant, Williams and Chase, at the time the goods were purchased from the plaintiffs, and the note on which the suit is brought was executed. But they exhibit a project of a partnership contemplated to be perfected at an indefinite future period, resting on the performance of the conditions contained in the agreement of the contracting parties. That this agreement is executory, is manifest from its provisions, "That the said Williams does, for himself, his heirs and assigns, agree to

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lease, for the occupation of said establishment, a certain lot of ground," etc.; not that he does hereby demise, grant, and to farm let a certain lot of ground, etc. "And, for his part, does further covenant and agree to erect the necessary buildings, in order to go into the operation, to commence thereon immediately." That is, that he shall immediately commence the erection of the necessary buildings to go into the operation of the distillation of grain, an undertaking that necessarily required some time and much labor for its completion.

Again, "The said Gardner and Chase do, on their part, agree to provide the stills and worms for said establishment. It is further understood that a store of goods shall be established, to be furnished by the said Gardner and Chase; and after the establishment shall be completed, the goods and stills upon the spot, an proportionate (apportionment) of the amount paid by each shall take place, and a full adjustment be made," etc. To provide stills and worms, and furnish a store of goods, to bring them to the spot, and to adjust the proportion of stock each party to the agreement would be entitled to, necessarily required some time for their accomplishment. Hence, it is evident that this agreement was, from the terms of it, executory in its nature. But the plaintiffs have failed to prove that the provisions of this contract had been complied with by Gardner and Chase on their part, at the time the goods were purchased from the plaintiffs and the note in question given by William Chase in the name of William Chase & Co. Hence, it is most manifest, that at that time no actual partnership did exist between Chase and Williams, and therefore he had no authority to bind Williams or to render him in any way responsible to others. This position is fully supported by Watson on Partnership, in margin, page 184, where it is declared: "So essentially necessary is it that a person sought to be charged should have been actually a partner at the time the contract sued upon 91] was entered into, that if it clearly appear that no \*partnership existed at the time of the contract, no subsequent act or acknowledgment by him will render him liable."

The case of *Saville v. Robertson and Hutchinson*, 4 Term Rep. 720, illustrates and establishes the foregoing doctrine; that was an action for goods sold and delivered to Samuel Pearce. At the trial a special case was reserved, which stated as follows: "In April, 1787, the defendants and one Samuel Pearce, since deceased, and

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one William Robertson, since a bankrupt, entered into the following articles of agreement:

"Articles of agreement made the 19th day of April, 1787, between J. Hutchinson and J. Robertson, of London, merchants and copartners, as well on the part and behalf of themselves, as of others who shall subscribe their names on the back of these presents, of the one part, and Samuel Pearce, of, etc., merchant, of the other part, etc.

"Whereas the said Samuel Pearce is the sole owner and proprietor of the ship *Triumph*, etc., and whereas the said J. Robertson, J. Hutchinson, and others, who have or shall subscribe their names on the back of these presents, have mutually agreed upon a joint undertaking and risk, as to profit and loss, in a certain voyage or maritime adventure about to be performed under the direction of the said parties, who have or shall have a majority of interest therein, or of a committee appointed by them: now these presents witness that the said J. Robertson and J. Hutchinson, on behalf of themselves and all others who shall subscribe, etc., and the said Samuel Pearce, for himself, in consideration of the trusts which they severally repose in each other, mutually agree with each other, etc.: 1. That the said ship *Triumph*, of which the said Samuel Pearce is the sole proprietor, shall, from the day of the date, until her return from her intended voyage, be at the disposal, direction, and risk of all the parties hereto jointly, at the valuation of 3,750*l.*, etc. 2. The said J. R. and J. H. and others shall, on or before the 20th of August next, provide a cargo of goods to the value of between 22,000*l.* and 25,000*l.*, which goods shall, in the opinion of a majority of the parties to these presents, be deemed eligible for the voyage and markets, etc. 3. The additional outfits of the ship, in cables, etc., shall be on the joint account, etc. In case the said Pearce shall be desirous to increase his interest in the said joint concern, by shipping on the joint account as he may think proper, the goods to be such articles as a majority of those concerned or their committee shall approve as proper for the voyage, etc., \*that the 3,750*l.*, together with [92 such additional goods as he may ship, to be his share of the capital in the *joint undertaking*, etc., and to receive the profits and bear the loss in proportion as the amount of all such sums shall be to the remainder of the said joint concern, etc. And the said J. Robertson, J. Hutchinson, etc., shall receive the profit or bear the

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loss in proportion to the sums set opposite their several names, etc. Signed and sealed by J. Robertson, J. Hutchinson, S. Pearce, and W. Robertson." The remaining articles are not material.

In May, 1787, the plaintiff, on the order of Pearce, supplied copper to sheath and repair the ship *Triumph*, to the amount of 482*l.* In August the plaintiff delivered copper on board the ship by the order of Pearce, to the amount of 938*l.* 3*s.* 3*d.*, which formed a part of the cargo thereof. In October, 1787, the said ship sailed from London to Ostend, and thence to the East Indies, with the goods as furnished by the plaintiff, and other goods on board. In January, 1788, Pearce became a bankrupt, and Saville proved his debt under the commission against him, etc.

"**LORD KENYON, C. J.** Some of the points made at the bar admit of no doubt. It is clear that if all these parties had been partners at the time these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. But my difficulty arises from the form of this action, which is for goods sold and delivered; for I do not see how any act which passed subsequent to the delivery of the goods, can have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be a partnership contract, if the contrary had not expressly appeared. The facts of the case are shortly these: Several persons who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of the vessel was a joint concern of all the partners, to wit: the copper for sheathing the ship, which is admitted to be a partnership concern; but beyond that I see no partnership between the parties till all the parcels of the cargo were delivered on board, and that made it a combined adventure between all the parties.

"I can not distinguish this case from that put at the bar, where several persons were to contribute their separate quota of money, and they applied to different scriveners to procure it. They could not all be liable for the capital which each should borrow. At the time when the copper was furnished, Pearce stood in no relation  
93] \*whatever to the other persons, but he alone bought the copper in his own name, without carrying to market the name of any other person than his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board,

against whom must the action have been brought? Pearce only: for he alone was answerable at that time. I can not, therefore, see how it can be said that these goods which were sold to Pearce only, and on his sole credit and account, were sold and delivered on the partnership account. Afterward these defendants were to gain or lose by their joint cargo. When the other goods were brought in, the partnership arose; but each was to bring in his own particular stock. But in this case, I think the question stops short of affecting the defendants, and I can not see how the plaintiff has a right to call on the defendants as partners, for the value of the goods, on a supposed contract, when the real contract between the buyer and seller was consummated before this joint risk began. Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share. It could not be contended that if one of them should borrow money for his share, all the others would be liable for it."

The case at bar presents a stronger case for the defendant, Williams, than the case cited exhibits for the defendants, Robertson and Hutchinson. In their case, the goods ordered by Pearce came into the possession of the contracting parties, and the adventure was actually made for the benefit of the joint concern. In the case at bar, the goods purchased by Chase, and for which the note was given, never came to the possession of the parties to the agreement, but were received by Chase, and sold by him for his sole advantage. In the one case the partnership was consummated—in the other it never has been perfected.

There is another ground submitted to the consideration of the court. That a partner, to bind his copartners, must sign in the partnership name, when that name has been agreed upon—when not, in the name of all the members of the firm. But no name of partnership was given to this firm in their agreement, nor proved to have been otherwise made. Therefore the signature of "William Chase & Co." could not bind the defendant, Williams, had he been an actual partner at the time; but it will be obligatory on William Chase only.

\*Opinion of the court, by Judge BURNET.

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The question to be decided is, was there a partnership at the date of the note, so as to render Williams liable to this action.



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On the part of Williams, it is contended that these articles do not show a partnership, at the time the note was given, but only a project for a partnership, to be consummated at a future day.

For the plaintiff, it is insisted that the contract created a complete partnership from the moment it was signed, and that the stipulations as to what each partner shall do, are nothing more than a distribution of the services to be performed by each, for, and on account of the joint concern.

In deciding the question submitted, it is necessary to ascertain what constitutes a partnership in the view of the law. Having done so, we may determine the true construction of this contract, and whether it did or did not create a partnership between the parties, from the time of its execution.

A partnership has been defined to be "a contract of an association, by which two or more contribute money, goods, or labor, to the end that the profits may be ratably divided between them." This definition, as far as it goes, is said to be unexceptionable; but it is incomplete, as to third persons, between whom and the parties the question most frequently arises. In this respect, it is observed that he who shares in the profits ought to bear his portion of the losses, because by taking the profits he takes the fund on which the creditor relies for payment. In order to constitute a partnership so as to make a person liable as a partner, there must be some agreement between him and the ostensible person to share in the profits, or he must have permitted the ostensible person to use his credit, and to hold him out as one jointly answerable with himself. 1 Com. on Cont. 286; Doug. 371.

In order to constitute a partnership, a communion of profit and loss between the parties is essential, and this is the true criterion to judge by, when the question is, whether persons are parties or not. 1 H. Blac. 43, 48. Where one takes a moiety of the profits, he shall, by operation of law, be made liable for losses. 2 H. Blac. 247. But where an agreement was made for the purchase of goods, in the name of one, for the benefit of several, but the agreement did not extend to a joint sale of the goods, a majority of the court held that it was not a partnership, but had the agreement extended to the sale as well as the purchase, all would have been liable, though but one was known in the purchase. 1 H. Blac. 37. Though in 95] \*point of fact, parties are not partners, yet if one so represent himself, and by that means gets credit for the other, both shall be

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liable. 1 Esp. 29. In the case of *Waugh v. Carver and Giesler*, 2 H. Blac. 235, it was admitted that the parties to the contract did not intend to become partners, or to carry on trade at the risk of each other, or to become liable for each other's losses, but yet it was determined that as to third persons they were partners, because it appeared from certain parts of the agreement that they intended to share the profits. This case was decided principally on the authority of *Grace v. Smith*, 2 Blac. 998, in which it was settled that every man who takes a share of the profits, ought, by operation of law, to bear his share of the loss. Let these principles be applied to the case before us, and there does not appear to be any room for serious doubt. It might have been the intention of the parties to the agreement that each person should pay for the articles or goods he purchased; but the expectation of partners is not to affect the legal right of their creditors. The question is not simply, what the parties intended by the contract, but whether third persons had not a right to rely on their joint credit. To determine this we must refer to the agreement itself. The first provision is, that the three parties to the contract, do agree to erect and build a distillery jointly, to share and share alike the cost of said establishment. The defendant, Williams, is to lease a certain lot for the use of the establishment, to continue for the term of fifteen years and to commence from the time of signing the said instruments. He agrees on his part to erect the necessary buildings—Gardner and Chase agree, on their part, to provide the stills and worms for said establishment. A store of goods shall be established, to be furnished by Gardner and Chase. After the establishment shall be complete, the goods and stills on the spot, the whole establishment, goods, etc., to be equally owned by the three partners. From this it appears that the parties were all equally interested in the establishment. They were to be joint owners of the goods, which were to be sold at their store, for their common benefit. They were consequently to participate in the profits.

Again. It would seem that the term, establishment, as used in the agreement, was intended to embrace the whole concern of the parties, and to include the store, as well as the distillery. If this inference be correct, no doubt can remain, as the first article in the contract provides, that the parties shall share and share alike the cost of the establishment. The cost of an establishment must include all moneys expended, and all debts contracted in the [96

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completion of it, which would, in this case, include the debt on which the suit is brought. The mind seems to be irresistibly led to this conclusion from the consequences that a different construction would produce on the parties themselves. Admit for a moment that the defendant's construction is to be sustained, and what is the consequence? Williams, on his part, is to furnish the ground and to erect the buildings, at the joint cost of all the parties. Chase and Gardner, on their parts, are to furnish the stills, worms, and goods at their own individual cost; and when all are furnished, each is to be an equal owner of the whole. The injustice of such a construction, must be apparent.

But if it be admitted that the store was not considered as a part of the establishment, but merely as an appendage, the same conclusion seems to follow, for as the principal establishment was by express stipulation to be erected at the joint cost of all the parties, the appendage to the establishment must be provided on the same terms. Justice requires it—the common sense of mankind requires it.

Had it been the intention of the parties to provide for a partnership, to commence at a future day after each of the parties had furnished his portion of the stock, the contract would have contained some stipulation as to the amount to be furnished by each, and that it should be on his own credit, so that each might bring into the common stock an equal portion of it. But nothing is said on this subject. Each party is left to his own discretion. The building may cost much or little—the assortment of goods may be small or extensive—yet each is to be equally interested in, and an equal owner of the whole.

In forming an establishment of this kind, various duties and services were to be performed, and it was natural to distribute these among the parties with reference to their different capacities; hence we find that Williams was to have the building erected, and the other partners were to lay in the goods. This consideration will sufficiently account for this part of the arrangement, without searching for any other cause, and when in connection with this it is considered that all the disbursements and engagements of Williams, in performing his part of the contract, were to be at the joint cost of the concern, it seems to remove all doubt as to the understanding of the parties themselves on this point.

But some stress has been laid on the clause, that "an equal pro-

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portionate \*of the amount paid by each shall take place, and a [97 full adjustment be made." What we are to understand by an equal proportionate in this case can not be easily told, as that term is never used in any sense in which it can be understandingly applied in the connection in which we here find it. The meaning of it may be ascertained by determining what the intelligible parts of the contract require it should be. It is certain that a partnership is provided for—that a distillery is to be established—that the parties are to share and share alike the cost of the establishment—that a store of goods is to be furnished—that the parties are to perform different services in getting the establishment into operation—and that they are to be joint and equal owners of it. These provisions would seem to require another, that each party should render an account of his purchases and payments, in order to ascertain the whole amount of capital, the sum advanced by each, and the debt contracted on the credit of the company, by which their situation would be known, and their accounts could be correctly stated and adjusted. But in such a provision we can not see anything inconsistent with the commencement of a partnership from the date of the contract.

Great reliance is placed on the case of *Saville v. Robertson*, which the defendants consider as establishing the construction for which they contend. Independent of the fact that the court were divided in that case, we can not but view it as operating rather against the construction they contend for, inasmuch as the leading facts on which a majority of the court found their opinion do not exist in this agreement, and in the absence of those facts it can scarcely be doubted that the whole court would have concurred with Ashhurst; but let us examine the case, and compare it with the one before us. In *Saville's* case, each individual was to have an interest in the cargo equal to the amount of goods he might furnish. In this case, each party was to have an equal interest in the whole establishment. In that case the contract extended to a single voyage only, at the expiration of which each party was to receive back the amount of cargo he had furnished. In this case the contract was to continue fifteen years, and the interest of the parties was not governed by the amount furnished by each. In that case it was expressly stipulated, that the parties should not be liable for the engagements of each other. In this case it is as expressly stipulated that the parties shall share and share alike the cost of the establishment. In

that case the copper for which the suit was brought was purchased 98] on the individual credit of Pearce, who did not take the name of \*any other person into market, nor did the seller look to the responsibility of any other. In the case before us, Chase took the names of all the parties into market, and the goods were purchased on the responsibility of the defendant Williams. In that case it was stated what should be done on the joint credit of the company, and what on the credit of the members individually; it was provided that one should not be bound by the contracts of another, and no confidence had been created nor any credit obtained in consequence of the association. But in this case there is no such provision. Williams was held out as a partner; his name was carried into market, and the fact of his being a member of the company procured for it all its credit. Connected with these circumstances the facts, that the parties were to share the cost of the establishment—that Williams was to be an equal owner of the goods which were to be sold for their joint account, and that they were all interested in the profits, and it would seem that no doubts can remain. It would certainly be a novel case if Williams was to furnish his part of the stock at the joint cost of all the parties—Gardner and Chase to furnish their part at their own individual cost, and then each partner should be an equal owner of the whole. Such a construction can not be admitted.

There are other circumstances in the case from which inferences might be drawn; as for example, the language of the article is in the present time—the parties do agree to erect, etc.—the law shall commence from the time of signing the instruments, and the receipt on the back of the article recognizes a liability for debts as well as for costs, but we have not thought it necessary to dwell on these facts.

We do not discover any serious difficulty in the form of executing the note. The agreement being silent on that subject, the fair presumption arising from all the circumstances is, that the form adopted by Chase was the one agreed on by the parties.

We are clearly of opinion that the partnership commenced from the signing of the articles, and that the plaintiff had a right to look to the credit of all the parties. A new trial, therefore, must be granted.

**\*DUNCAN McARTHUR v. SARAH PORTER, WIDOW, AND OTHERS. [99**

Where the vendor of a tract of land, having a lien for the purchase money, obtains a judgment, upon which the land is sold for a sum sufficient to pay the whole amount, the lien does not pass to the purchaser of the land, so as to enable him to set it up against the widow's estate of dower, but is extinguished by the sale on execution.

THE substance of the case made in the bill and answers, is this: In May, 1797, George Porter, then being unmarried, purchased of Nicholas Talliaferro, part of an entry for land standing in the name of Talliaferro, and gave his bond for the purchase money, reciting that it was given for the purchase money of the land, and specifying that the land was to be held as a security until the bond was taken up. Porter obtained an assignment of the entry and warrant from Talliaferro, had a survey executed, and in August, 1797, obtained a patent in his own name. In April, 1798, he married the defendant, Sarah. In September, 1801, George Porter deceased, and administration upon his estate was granted to Peter Porter. The bond given to Talliaferro not being paid, suit was brought on it against the administrator in the general court of the territory, and at October term, 1802, judgment was rendered and execution awarded. The writ of execution commanded the sheriff to make the debt, charges, and costs of the goods and chattels remaining in the hands of the administrator, and for want of such goods and chattels, to make the same of the lands and tenements. Upon this writ, the sheriff returned that there were no goods, and a levy upon four hundred and fifty-two acres of land, condemned to be sold by a jury of twelve men, and not sold for want of bidders. There were, in fact, no goods. Upon a subsequent execution, the land was sold by the sheriff to the complainant for the sum of \$1,521. The money was paid to the sheriff, and on the 19th December, 1803, the sheriff made the complainant a deed. The judgment was satisfied, and the balance of the money paid over to the administrator, and the complainant obtained possession of the land.

The defendant, Sarah, prosecuted her writ of dower against complainant, and recovered judgment for one-third of the prem-

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ises, and for damages at the rate of thirty-five dollars per year from September, 1802. The bill prayed a perpetual injunction, upon the ground that the bond for the purchase money, under which it was sold upon execution, attached as an equitable lien upon it, which was paramount to the widow's dower, so that the sale by the sheriff divested her right in equity.

100] \*The bill also claimed that the complainant ought to be considered in equity as the holder of the bond of Talliaferro and the lien connected with it, and that the widow could set up no claim for dower until such lien was discharged; and that after so much of the land was sold as would discharge the lien, she should be endowed of the remainder only.

And it claimed further, that the widow ought only to be endowed of the value of the land and of the improvements, as they were at the death of her husband, not as they were when her recovery was had.

And if the court sustained the recovery of dower, it claimed of Talliaferro, who was made a defendant, that he should refund of the amount received *pro rata*, and asked a decree to that effect.

The cause was argued at great length by Scott and Grimke for the complainant, and by Brush and Ewing for the defendants.

The points discussed were:

1. Whether, under the territorial law of 1802, the lands of an intestate were subject to be sold on execution upon a judgment against the administrator alone, the heir not being a party?

2. Whether Talliaferro's bond attached as a lien, in preference to the widow's right of dower?

3. Whether the territorial courts have power, as courts of law, to set up and enforce such lien, by subjecting the widow's right of dower to the discharge of the lien or purchase money, and what proceeding should have been had for that purpose? But as the majority of the court have placed the decision of the cause upon grounds not discussed in the arguments, it is deemed unnecessary to report them, especially as they are fully noticed and considered in the dissenting opinion of Judge Burnet.

By the COURT:

The view taken of this cause by a majority of the judges, renders it unnecessary to decide upon the validity of the sheriff's sale—the existence of the equitable lien relied upon—or the

power of the territorial courts, as courts of law merely, to enforce such equitable lien. Admitting every one of these points to be decided as the complainant contends for, still he has presented no case that entitles him to the relief sought.

George Porter, the deceased, acquired, by his patent, an estate of inheritance in the lands in question. The defendant, Sarah, by her marriage with George Porter, acquired the right of being endowed in these lands, if she survived her husband. Upon his death, \*this right invested her with a complete, perfect, [101 legal estate. If an equitable lien existed upon the lands for purchase money, it belonged to Talliaferro, and to no one else. As to all the world beside, her right was clear and unquestionable at law. At the sheriff's sale the complainant did not purchase any right or interest that belonged to Talliaferro. He purchased the estate of which George Porter died seized, and nothing more. George Porter held this estate subject to his wife's claim for dower. In his lifetime, he could not, by any act of his own, discharge the estate of this claim. The sheriff could sell nothing more than what George Porter himself could have sold. The land, therefore, was sold by the sheriff and purchased by the complainant subject to this charge of dower. The prosecution of this bill, and the arguments in support of it, seem to involve this admission. If the complainant acquired the widow's dower by the purchase at sheriff's sale, it would have availed him as a defense to the action at law. This suit would not be necessary. Where nothing but a legal right was sold, how could he acquire an interest to be set up and established in equity? The land was sold as assets in the hands of the administrator, for the payment of the debt due of the purchase money. It sold for a sum sufficient, and the proceeds were applied in discharge of that debt. By this payment, the lien for purchase money, whatever its character or effect might be, became extinct. It never passed from Talliaferro, but perished in his hands.

Had the estate of Porter, which was assets in the hands of his administrator, proved insufficient to pay the debt, it would then have been necessary for Talliaferro to have enforced his lien against the widow's dower estate. This could only be done by making the widow a party. Could she have been legally divested of the freehold vested in her by the death of her husband, upon the mere suggestion of an equitable lien, of which she might be



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totally ignorant, without giving her a day in court to defend her right or redeem her land? Such a principle would be most arbitrary and unjust; it is only by the application of such a principle that the complainant's claim can be sustained.

It may be asked how the territorial courts, having no chancery jurisdiction, could have proceeded against the widow? It may be answered, that if they could not proceed at all, the consequence would be rather that the widow should hold her estate than that she should lose it, without hearing or judgment. But if everything that was assets in the hands of the administrator had been [102] \*exhausted and the debt not satisfied, a proper process might have been devised to subject the widow's dower, determining, in the first place, that it was liable, and in the next place, directing how it should be sold. A *scire facias* setting forth the whole matter, and calling upon the widow to show cause why her dower estate should not be subjected, might have been a proper course. Such a proceeding would have carried with it some semblance of justice, which is not the character of the doctrine contended for by the complainant.

Adopt this doctrine, and what is the consequence? The equitable lien is a secret circumstance known only to the creditor and debtor—other persons have no opportunity to obtain a knowledge of it. It does not appear upon the records of the court, or in the registry of deeds, nor in the terms of sale. The bidders never hear of it. They bid for the estate, subject to the dower incumbrance, and offer a price accordingly. If it be afterward discovered that the judgment creditor held a secret equitable lien, the purchaser may claim it as his own, and call upon a court of equity to set it up for him, in destruction of the widow's right—thus acquiring, through the aid of a court of chancery, a valuable interest in the estate, which was not contemplated at the time of purchase, and for which he paid not one cent of consideration.

Such, in the opinion of the court, is the claim of the complainant. He seeks—without the payment of a cent of money, or the performance of a single beneficial act to the estate by way of consideration, under pretense of an equitable lien, which, if it ever existed, he never owned, and which was long since extinguished—to wrest from the widow a valuable legal estate, vested in her by the death of her husband, in absolute right, without her ever

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being made a party to the proceedings that thus annihilates her rights. An attempt of this kind ought not to receive the countenance, much less the aid of a court of chancery.

It is the opinion of a majority of the court, that as the complainant purchased the estate in question, subject to the widow's dower, her recovery leaves him in full possession of all that he purchased. As he has lost nothing, he can claim nothing of Talliaferro or of others. His bill must be dismissed, with costs.

Judge BURNET's dissenting opinion :

Having dissented from the opinion of the court, given in this cause, I feel it my duty to state the view which I have taken of the subject, and which has led my mind to the conclusion that the decree ought to have been in favor of the complainant. In [103 order to do this intelligibly, it will be necessary to state the leading facts in the case. In May, 1797, George Porter, since deceased, purchased the land in question from Nicholas Talliaferro, and gave his bond for the purchase money. The condition of the bond specified that it was given on account of the land, and that the land should be held as a security until the bond was taken up. In August of the same year, Porter obtained a patent, and in April, 1778, intermarried with the defendant, Sarah Porter. In 1801 he died intestate seized of the premises, leaving the said Sarah, his widow, and W. I. Porter, his only child and heir at law. Peter Porter took letters of administration on the estate of George Porter. Talliaferro instituted a suit against the administrator for the balance of the purchase money not paid, and obtained a judgment in October, 1802, before the general court of the territory, for \$1,125.16. On this judgment execution issued, and there being no goods and chattels in the hands of the administrator, the sheriff returned *nulla bona*, and that he levied on the land in question, being a part of the tract purchased of the plaintiff. The complainant became the purchaser at the sheriff's sale and obtained his deed in due form of law.

When the judgment was obtained, and when the execution was levied, there was no court of chancery within the territory. Sarah Porter has since set up a claim of dower, and obtained a judgment at law against the complainant, against which he prays to be relieved.

Many points are presented in the record, and have been discussed.

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in the argument, but it appears to me the case may be settled by the examination and decision of two questions. *First.* Did McArthur acquire a legal title in the land in dispute, by his purchase at the sheriff's sale. *Second.* Was Talliaferro vested with such an equitable lien on the premises as will enable the complainant to hold them, free from the claims of the widow's dower, he having purchased at a sale for the satisfaction of the debt, which is alleged to have been a lien.

In deciding the first question, it will be necessary to look at the statute of 1795, which was in force when the action against Porter was commenced, and which is substantially the same as that of 1802. This statute was adopted from the Pennsylvania code, in which we find two statutes on the same subject, one passed in the year 1700, which was supplied by the other, passed in the year 1704. The governor and judges, who, it will be recollected, con- 104] stituted the territorial legislature, under the first grade of government, adopted the latter act, the first section of which is in these words, "To the end that no creditors may be defrauded of debts justly due to them, from persons who have sufficient real, if not personal estate, to satisfy the same, all lands, tenements, and hereditaments, *whatsoever*, where no sufficient personal estate can be found, shall be liable to be seized and sold on judgment and execution obtained." This section is literally transcribed from the law of Pennsylvania, under which it has been uniformly decided that lands are liable to be sold on judgments and executions against executors and administrators, without the interference of the orphans' court, and without any previous proceeding against the heir. It was natural for the courts of the territory to adopt the rule of construction which had been settled in Pennsylvania, as the statutes were the same, and as their construction appeared to be reasonable, beneficial, and in strict conformity with the letter of the law. Accordingly, we find that the general court of the territory, in construing our statute of 1795, decided, in accordance with the rule established in Pennsylvania, that lands were liable to be taken and sold on judgment and execution against executors and administrators, in the same manner as in other cases; and such was the uniform practice under the territorial government. As the statute of 1802 did not make any substantial variation in the law, in this respect, the construction just adopted was continued, and the general court were in the constant habit of allowing and sustaining

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such executions and levies; nor do I recollect of hearing the soundness of their construction questioned till after the establishment of the state government. That construction had been given to the law before I commenced practice, in 1796, and in the western part of the territory its correctness was not questioned.

But it was contended at the bar, that the decisions in Pennsylvania were founded on the law of the year 1700, which subjected "all lands of debtors to sale on judgment against them, their heirs, executors, or administrators." It appears to me that the defendants can not strengthen themselves by taking this ground, for two reasons. *First.* Because if the law of 1704 materially altered that of 1700, it must, so far, have repealed it; for, if they contain different provisions, the former must give place to the latter—both can not stand. *Leges posteriores priores abrogant.* *Secondly.* Because it appears easy of demonstration that the two laws are substantially the same. The first subjects all lands of debtors to sale on judgments against \*them, their heirs, executors, or ad- [105 ministrators. By the second, "all lands, tenements, and hereditaments, *whatsoever*, are liable to be seized and sold on judgments and executions obtained." The additional words, heirs, etc., in the first act, can not, under this provision, be more extensive than we find it in the second. The only difference seems to be, that the latter statute, from which ours was copied, subjects all lands to sale on judgment and execution obtained, without designating any case, not even judgments against debtors themselves, while that of 1700 enumerates the cases. Had the latter statute authorized the sale of the debtor's land on judgments against *him*, without further provision, the case might have been different; for then it would have been a fair inference, that having mentioned one description of cases they meant to exclude all others; but having specified no case, and having made the provision broad enough to embrace every description of cases, they might well omit the words heirs, executors, or administrators as surplusage. Had it been their intention to give the statute a more limited operation than that of 1700, they would have selected such terms as were calculated to answer their purpose; they would have enumerated the cases which they intended to embrace, or would have excepted those designed to be excluded. But they have done neither. As they have omitted those words of the first case which relate to the debtor himself, as well as those relating to his representatives,

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the conclusion seems to be inevitable that they were considered as surplusage, and that the provision, couched in the general terms of the latter law, was the same in its effects as the more special one in the former law. If it had been the intention of the legislature, by changing the language of the first act, to give the construction contended for by the defendant's counsel, they would have retained the general phraseology of the first law, omitting the words heirs, executors, and administrators; but as if for the purpose of excluding that construction, they have not only omitted those words, but have varied those preceding them so as to render the second act more general and comprehensive than the first. The correctness of this remark will be apparent to every person who will attend to the effect that would have been produced on the first act by the simple omission of the words heirs, executors, and administrators, and then advert to the further effect that has been produced by the alteration of the words in the preceding part of the section. But be this as it may, the courts of Pennsylvania 106] have decided either that the two laws are essentially \*the same, or that the law of 1704, of which ours is a transcript, authorizes the sale of real estate on judgments against administrators, because their decisions have been made subsequent to the passage of that law, which must have repealed the former as far as it was inconsistent with it.

The first section of the act of 1802, under which Talliaferro's judgment was obtained, is in the following words: "The better to enable creditors to recover their just debts, all lands, tenements, and real estate shall be liable to be levied upon and sold by execution to be issued on judgments, which may hereafter be recovered in any court of record within the territory, for the debt, damage, and cost due and owing on such judgment." This language is as general as words can make it. It embraces without exception all creditors, all debts, all real estate, and all judgments, and it requires nothing but the judgment and execution to authorize the levy and the sale. There is nothing in the act that excludes judgments against administrators, or that requires any step to be taken, after judgment, and beyond execution, in order to justify a levy and sale. If land may be taken and sold by execution on any judgment, it may certainly be taken on a judgment against an administrator, as the law makes no distinction. An application to the orphans' court, or a *scire facias* against the tertenants, is not

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required, nor is it believed that any important benefit would result from it, to countervail the delay and expense that would certainly follow. It would have been easy to shape the law so as to have made but one or the other necessary. The law subjecting real estate to execution for debt, and the law for the settlement of intestate estates, have no reference to each other. They are distinct statutes, intended for different purposes. The former authorizes a sale by execution where there is a judgment, without the agency of the orphans' court. The latter authorizes a sale by the orphans' court, on the application of the administrator, without the agency of the creditor. The one puts it in the power of the creditor to effect a sale where the administrator does not choose to act. The other enables the administrator to proceed and settle the estate where the creditor does not see proper to act. The remedies appear to be concurrent and independent; neither seems to require or exclude the other. In the one case the court before which the judgment is obtained will protect the rights of all persons concerned. In the other, the orphans' court which grants the order of sale, will perform the same office. As I can not perceive any particular advantage that would be gained by \*requiring the judgment [107 creditor to apply through the administrator to the orphans' court for an order of sale, and as such a course is not required by the letter of the statute, there appears to be no sufficient reason to induce a court to require it. The difference that exists in the nature and extent of the lien which creditors have in this country and in England on the lands of their debtors, is sufficiently striking to show that many of the formalities that are considered necessary in that country are not so in reality in this. In England the personal estate is the fund for the payment of debts, and for that purpose it goes as assets into the hands of the administrator, while the real estate descends immediately to the heirs, unincumbered with any lien that will justify the creditor in meddling with it, without a previous judgment against the heir. But not so in this country; here lands are assets to the same extent as chattels, and the only difference is, that the personal property must be exhausted before the real estate is resorted to. In England the liability of land to the claim of creditors is partial and limited. Here it is general and extends to the whole interest of the debtor. There was not, therefore, anything incongruous or improper in the principle recognized by the legislature, and adopted by the court

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in the construction of this statute. At all events it must be conceded that the phraseology of the law admitted of the construction given to it, without violating any principle of common law that had been recognized or adopted in the territory, although other judges equally learned might have been disposed to give it a different construction. It will also be admitted that the general court of the territory had a right to settle the construction of statutes, and that their decisions should be considered as the law of the land. In 1 Blac. Com. 69, it is said to be "an established rule to abide by former decisions where the same points come again in litigation, as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion, as also because the law in that case being solemnly declared, what was before uncertain and probably indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments." The only exceptions to this rule are where the former decision is evidently contrary to reason or the divine law. The Supreme Court of the United States have recognized this rule, and have uniformly adhered to the construction given by the superior courts of the several states to their own statutes. In the case of *Telfair v. Steads, Ex'r*, 2 Cran. 418, that court adopted the construction given by 108] \*the courts of Georgia, to statute 5 George II., by which construction lands were made chargeable for debts in the colonies without making the heir a party. In the case of *McKeen v. Delancy, lessee*, 5 Cran. 32, although the Supreme Court of the United States considered the construction given to an act of Pennsylvania by the Supreme Court of that state, to be incorrect, or such a one as they would not have given had the question been presented for the first time, yet they adhered to the construction given by the state courts, observing that in construing the statutes of a state on which land titles depend, infinite mischief would ensue should they observe a different rule from *that* established in the state. The same doctrine is held in *Higginson v. Mein*, and *Pollard, etc. v. Dwight, etc.*, 4 Cran. 418, 429. In 2 Blac. 264, it is said, where an error is established and has taken root, upon which any rule of property depended, it ought to be adhered to by the judges, till the legislature think proper to alter it, lest the new determination should have a retrospect and shake many questions already settled.

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It would be highly improper for this court to disregard the construction given by the general court of the territory, to the statute in question, for many reasons. 1. The statute was adopted by them, and by their authority received its obligatory effect in the territory; they must, therefore, have known what they intended by the law. 2. The same construction had been previously given in the State of Pennsylvania, to a statute substantially the same. 3. By disturbing that construction much mischief would ensue, and many titles would be put in jeopardy. And lastly, as the statute has long since been repealed, there appears to be no necessity to alter or vary the rule, should it even be admitted to have been an improper one.

On the whole, I am led to the conclusion, that the statute authorized the levy and sale which were made in this case, and that the complainant, by his purchase, has acquired a legal title to the premises in question. On this point, however, I believe there is no material difference in the opinion of the court, though I am not authorized to say there is a perfect coincidence.

The next inquiry is, whether Talliaferro held such an equitable lien on the premises as will enable the complainants, by virtue of his purchase, to hold them free from the claim of dower? In considering this question, we are naturally led to inquire, whether Talliaferro held a lien—whether that lien is superior to the widow's dower—and whether the complainant, as a purchaser under the sheriff, is entitled to the benefits of it, to the exclusion of the right of dower?

\*The rule seems to be well settled, that the vendor has [109 a lien on the premises for the purchase money, unless he agree to relinquish it and rely on other security. Proof of such agreement must come from the purchasee; for, in the absence of such proof, the lien is considered as existing. The death of the vendee does not affect the lien, nor is it destroyed by giving an obligation for the purchase money, or by the payment of a part of it, and it exists in favor of an assignee. See 3 Eq. Cas. 682; 1 Vern. 267; 3 Alk. 277; 2 Ves. 622; 1 Johns. Ch. 308; and other cases there cited. So far from there being any agreement on the part of Talliaferro to abandon his lien, it appears, from the condition of the bond, that he relied on it, and that Porter understood and agreed that the land should be bound till the bond was discharged. The existence of the lien being ascertained, we are



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to inquire whether it excluded the widow's dower? We find that the purchase was made in 1797, and the marriage took place in 1798—consequently the lien existed before there was any pretense to the claim of dower. The right having once vested, it was not in the power of the vendee to alter or abridge it by any act of his own, so long as the purchase money remained unpaid. Such a power would be altogether inconsistent with the nature of the right, and would destroy the value of the security. A lien held at the will of him on whose land it attaches and whose estate it incumbers, would be a novelty in legal proceedings. It would form a species of security as useless as it is unknown. In fact, the idea of such a power is inconsistent with the existence of the lien, and amounts to a declaration that the lien was never in being. The law, by making this provision in favor of the vendor, intended to give him a beneficial security, and if so, the permanency of that security must be placed beyond the control of the vendee.

In principle, there is no difference between a privilege to destroy the right in part, or to abolish it entirely. We can prescribe no limit to the exercise of such a discretion. But it is apparent that the vendor had a right to hold the entire estate in security. The law gave him an equitable mortgage, and it must protect it. I, therefore, conclude, that as the lien extended to the whole of the land, it was not in the power of the vendee, by any transaction or contract of his own, to relieve a third or any portion of it from the operation of that lien; and whatever might be the decision as to the widow's claim, when prosecuted in a court of law, in this court it must yield to the prior equitable claim of the vendor. The doctrine of notice, it is conceived, does not apply to a case circumstanced like the present. The widow does not stand on the ground of a purchaser, for a valuable consideration without notice. She comes as a participator in the rights of her husband, as they stood at the time of her marriage; and as far as those rights were incumbered, she must be affected by the incumbrance. Her claim is legal, not conventional: it would, therefore, be doing violence to the laws—it would raise it above itself—to give it the double operation of divesting the widow of a settled right for the arbitrary purpose of vesting it in another. On the same principle, a legal mortgage would give way; but I believe that the law, in settling the rights of the widow, has had a scrupulous regard to the rights of others. Hence we find many cases in which her claim yields

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to the superior equitable claims of others; as, for example, if her husband exchanges land with another person, she can not be endowed of both tracts, although her husband was seized of an estate of inheritance in both during coverture, because it would be unjust and would operate injuriously on the rights of others. And for the same reason, if her husband, being seized in common with another person, make partition, and that person be evicted for want of title, she shall not have her dower in that part of the land which his co-tenant may recover *pro rata*. 2 Bac. Dower, B. 4; F.N.B. 150. So, if her husband were seized of a joint estate and died, she shall not be endowed on account of the survivorship, for the survivor claims from the grantor, which is prior to her title of dower. So when a vendee, at the time of receiving his deed, executes a mortgage to the vendor to secure his purchase money, the wife of the vendee is not entitled to dower; for although her husband was seized, it was but for a moment, and it would be inequitable to support the claim in opposition to the clear understanding of the parties, by which the deed and mortgage are to be considered as parts of the same contract and treated as though they had been embraced in one instrument of writing. 2 Co. 77; 15 John. 459; 4 Mass. 560.

In *Winn v. Williams*, 5 Ves. 130, the master of the rolls decided, that a purchaser or mortgagee might protect himself against a claim of dower by taking in a mortgage executed before the marriage, "although the consequence will be, utterly defeating the right of dower."

The decisions by the courts of the different states, on this point, have not been uniform. In Massachusetts it has been settled that a widow is not dowable of an equity of redemption generally. 10 Mass. 364.

\*In Pennsylvania, the widow is dowable of land mortgaged [111 before marriage, but the right is subject to the mortgage. 2 Serg. and R. 554. But a sale on a *levari facias*, on a mortgage, will bar the right of dower, though the mortgage were executed during coverture. *Scott v. Crosdale*, 2 Dall. 127; 4 Dall. 301, note.

In New Jersey, dower can not be claimed of land mortgaged before coverture. 1 South. 260.

In Connecticut, Maryland, and New York, a widow may be endowed of an equity of redemption. 1 Conn. 550; 7 John. 282.

In North Carolina, it has been decided that a widow is entitled

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to dower only of such lands as the husband died seized of, and consequently that an alienation by the husband alone, during coverture, is a bar to dower. 1 Hayw. 243.

In Virginia, a mortgage by the husband during coverture does not bar dower, unless the wife join. 2 Munf. 527.

In South Carolina, the court said, in *Wells v. Martin*, the right to dower had a preference to mortgages or any other incumbrances made or suffered by the husband in his lifetime. 2 Bay. 22. But the reporter, in a note to *Bogie v. Rutte*, etc., 1 Bay. 312, says, that it has been repeatedly determined in the courts of that state, that "widows of mortgagors were not entitled to dower."

In Kentucky, the widow may be endowed of any beneficial interest of which her husband was seized during coverture. In the case of *Winn, etc. v. Elliot's widow, etc.*, Hard. 488, which was a bill in equity to bar the widow of her dower, the husband had, during the marriage, a beneficial interest: he had acquired the legal title, and he died seized in law, whereby, said the court, the wife's right to dower became complete at law, and they decided that her claim should not be ousted by an equity against the husband *derived during the coverture*, and from the husband: nor should it be defeated by showing a title not derived paramount to the husband's, but under it; nor *by an equity that did not commence previous to the wife's*, but subsequent thereto.

In Ohio, it is admitted that the widow is dowable of lands mortgaged or aliened by the husband during coverture, if she do not join in the mortgage a deed of conveyance. And it has been decided, in the case of *Ewing v. Stansbury*, that she shall be endowed with reference to the value of the premises at the time of the alienation.

But it is confidently believed, that no court in the United States has decided that a widow is dowable of an equity of redemption, 112] \*where the mortgage was executed before coverture, without the qualification that her right is subject to the mortgage. In the case of *Collins v. Torrey*, 7 Johns. 283, the court say: "The plain and necessary rule is, to allow her the dower, which she must take, as the heir or the purchaser takes the estate, subject to the mortgage."

It only remains now to inquire, whether the complainant, in consequence of his purchase, is entitled to the benefit of this lien? We have seen already that the lien continues in favor of an as-

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signee; but whether the complainant be considered in that light or not, as a purchaser at a sale legally made to raise the purchase money for the benefit of Talliaferro, he must be entitled to the same consideration that Talliaferro would have been entitled to had he become the purchaser—otherwise the value of the lien would be measurably lost. It was immaterial to Porter who purchased. If the land were bound for its price, to the exclusion of the title to dower, it must remain so in the hands of the complainant; for if the right of dower did not attach prior to the right of sale, it certainly could not be created by the sale. If there had been a court of chancery in the territory, and if Talliaferro had filed his bill and obtained a decree for a sale, the estate in the hands of the purchaser could not have been liable to the widow's claim. But as there was no such court, and the vendor was under the necessity of proceeding in a court of laws, it would be unreasonable to say that he shall lose his security, which would be the case, in part at least, were the purchaser to take the property subject to dower, as with that incumbrance it could not be expected to command its value.

This case, in principle, may be likened to a procedure on a legal mortgage, by *scire facias*, under our statute. If the mortgage be executed before the marriage of the mortgagor, the claim of dower yields to the lien of the mortgage, and the purchaser at the sheriff's sale will hold the premises, to the exclusion of that claim, because the lien is prior and superior to it.

In the case of *Garson v. Green*, 1 Johns. Ch., the decree was against the widow and heirs at law, for a sale of the premises without any reservation. It, therefore, seems to have been considered by the chancellor that the right of dower did not exist, and that the purchaser would take the premises free of this incumbrance.

From the view that has been taken of the subject, it appears to me that Talliaferro had a lien on the land which must be treated \*as an equitable mortgage, and which secures the land for [113 the payment of the purchase money, to the exclusion of subsequent incumbrances, and consequently that the right of dower in this case was subject to the lien, and can not be set up till the debt is satisfied.

The objection that the proceedings were had in a court of law, seems to be obviated by the fact there was no court of equity

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in the territory, and that under such circumstances courts of law will give the same relief as courts of equity, provided the forms of their proceeding will admit it. They can not enforce a specific performance, or compel a disclosure by the parties themselves, but wherever an equitable right can be presented, investigated, and decided in a form of action used by them, they will not hesitate to do it, and will enforce their decisions by any form of execution known to the law, and calculated to accomplish the object. Such was the fact in the case before us.

Is it objected that the widow was not a party in the proceedings at law, and therefore has not had a day in court? Neither is she made a party in proceeding on a mortgage, by *scire facias*, under our statute, although her rights are affected in the same manner and to the same extent. But she is now a party, and the merits of her claim are fully before us. If those merits have not been decided, and if, as has been urged, the proceedings at law have not concluded her, because the lien was not legal, but equitable, it would seem that the parties, being now before a tribunal of sufficient power, a final disposition may be made of the cause, by which the objection that the widow has not had a day in court would be removed. Should it be admitted that after the proceedings in the suit at law, and the subsequent establishment of a court of chancery, the widow might enforce her claim to dower, at common law, against the complainant, and that his defense, being an equitable one, could not there be heard, the admission would not affect the question, unless by showing that the remedy in the territorial court, for the want of full chancery power, was not complete, and that the aid of this court was necessary to perfect it. The admission would not affect the existence of the lien, or its operation on the claim of the widow, it would only show that a court of law would not continue to protect an equitable right after the establishment of a court of equity, and that this bill was necessary to quiet the complainant and relieve him from the claim at law. If the proceedings in the territorial court did not completely silence the widow's claim at law, the only resource for relief was to a court of chancery.

114] \*Should it be admitted in the broadest terms that the proceedings in the general court have had no bearing on the equitable lien of Talliaferro, or on the legal claim to dower, it would follow that the lien is yet to be enforced, and this is certainly the proper tribunal to do it. To render a mortgage operative, it is not necessary

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for the mortgagee to become the purchaser of the mortgaged premises. Should a third person purchase, at a sale to satisfy the mortgage, it must operate to protect him against after incumbrances, to the same extent that it would have done the mortgagee, had he been the purchaser, otherwise the mortgage would be of but little use, I do not therefore see the propriety of the conclusion, that because Talliaferro was not himself the purchaser, the lien has been discharged, and the complainant must be liable to an incumbrance that Talliaferro might have avoided had he purchased himself. If the lien existed, the whole object of it was to enable the vendor to have the land sold for the payment of the purchase money, free from subsequent incumbrances, and I consider it a matter of perfect indifference by whom the premises were purchased. If in this case the claim of dower is to be sustained because the mortgaged premises have been purchased at the suit of the mortgagee, and purchased by a stranger, at a price sufficient to satisfy the debt for which they were bound, on the same principle the claim of dower must be good in every case where a third person purchases under a judgment by *scire facias* on a mortgage, for a sum sufficient to pay the debt.

Whether McArthur relied on the lien or not, is a matter not known to the court, nor do I consider it material, as a man may be ignorant of his rights without forfeiting them.

On the whole, it appears to me that the equity of the case is with the complainant.

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\*DUGAN v. CAMPBELL.

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*Writ of Error to the Common Pleas of Muskingum County.*

Action can be sustained upon a note in writing, whether negotiable or not, without setting out the consideration or original contract.

The term currency means current money, where this interpretation is not controlled by the positive terms of the contract.

THIS was an action of assumpsit upon a promissory note in the following words: "Four months after date I promise to pay John S. Dugan or order seventy-five dollars for value received, payable

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in the currency of this place, if the said Dugan does not take it out in store goods at the same rate. Zanesville, August 17, 1820."

The declaration alleges that the defendant made his certain note in writing, commonly called a promissory note, and delivered the same to the plaintiff, by which he promised to pay, reciting the note substantially; it then proceeds as follows: "And the plaintiff avers and says that the defendant did not, four months after the date of said promissory note, pay to him or order seventy-five dollars in money current in Zanesville, nor did he the plaintiff take out that sum in store goods at the same rate, by reason whereof the defendant became liable to pay to the plaintiff the said sum of seventy-five dollars in lawful money, and being so made liable to the defendant, then and there afterward, to wit: upon the 1st day of January, 1821, at the county aforesaid, undertook and faithfully promised to pay the plaintiff the said sum of seventy-five dollars, when thereto afterward he should be requested." General issue pleaded, and verdict for the plaintiff. The court of common pleas arrested the judgment; to reverse which the writ of error was brought; general error assigned.

S. W. CULBERTSON, for plaintiff in error:

It is contended that the note declared upon, in this case, is not a promissory note within the meaning either of the English statute of Anne, or of the statute of Ohio; and not being a promissory note, though it contain the words "*for value received*," the contract ought to have been specially declared on and the consideration set out.

The definition of a promissory note, as it is understood at this day in Ohio, may be given in the words of Blackstone, 2 Com. 467: "Promissory notes, or notes of hand, are a plain and direct engagement to pay a sum specified, at a time therein limited, to a person therein named, or sometimes to his order, or often to the bearer at large." According to Butler, N. P. 272, it must be made  
116] payable \*on a certainty and not on a contingency. A note made payable to an infant *when* he comes of age, is a good note within the statute of 3 and 4 Anne, chap. 9, sec. 1; Burr. 226; and it is a good note if made payable on the death of A. 2 Str. 1217.

I understand a promissory note to be a written undertaking to pay a sum certain in money, or a certain representative of money, subject to no condition by which the liability to pay may be removed. If it is for the payment of money upon an event that

must happen, it is good, for the event renders the time of payment certain.

This is a note for the payment of a sum of money certain, and at a certain time. It is subject to no condition by the performance of which the defendant, without the assent of the holder, can defeat the right to demand money. It was to be paid if not taken out in store goods. The defendant could not tender store goods in discharge of the note; the plaintiff might take them if he chose, and he might have done the same thing if they had not been mentioned in the note. If the plaintiff called for store goods and the defendant did not give them, no new cause of action arose; no right of either party would be affected.

It is argued that the note is not made for a sum of money certain, because, although it calls for seventy-five dollars, it is payable, not in money, but *in the currency of Zanesville*, which was of less value than money. This argument asks the court to infer a fact not expressed in the note, that the "*currency of Zanesville*" means something other than money, than the legal currency of the country. The absurdity of this argument must be manifest from this fact. That notes drawn as this one is must receive different interpretations, according to the place where they may be drawn. If drawn at Chillicothe and payable in the currency of the place, nothing being considered current there but money, it would be a good promissory note. But if drawn at any place where depreciated bank notes had a current circulation, at a reduced price, it would not be good as a promissory note. To ascertain whether the note be good or not, the court are required to travel out of the writing and inquire what was the state of the currency at the place where it was drawn? This the court ought not to do, the note must be good or bad upon its own terms. The court should give one general legal interpretation to the words used. "*The currency of this place*," no matter where the note was executed, must mean the legal metallic currency of the country. The court can recognize no other unless the writing has specifically described it. If the engagement was \*expressed that the [117] payment should be in bank notes of any particular bank, then the questions might arise, what was the value of the paper of that bank, and could the engagement be considered one for the payment of a sum of money certain? As it is, no such questions can fairly arise.



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But if it were conceded that the terms "currency of this place" means bank notes, it would not vary the case. In *Keith v. Jones*, 9 Johns. 121, the note was for a sum certain, payable in York bills. The defendant demurred to the declaration, and the court overruled the demurrer. They said that the note was negotiable; "payable in York state bills is the same thing as being made payable in lawful current money of the state, for the bills mentioned mean bank paper, which is here, in conformity with common usage and common understanding, regarded as cash."

GODDARD and ADAMS, contra:

It is a principle of law too well settled to require any authorities from the books to support it, that there are only two classes of instruments which upon the face of them import a consideration. These are, specialties, and that class of simple contracts composed of promissory notes, and bills of exchange.

Before the statute of 3 and 4 Anne, c. 9, which placed promissory notes on the same footing with bills of exchange, Lord Holt uniformly held that promissory notes were nothing more than special agreements, possessing none of the properties of mercantile instruments, and that therefore the actual consideration on which they were founded must be set forth in pleading, and proved on the trial, and that a contrary determination would be setting up a "new kind of specialty hitherto unknown to the law. 2 *Ld. Ray.* 758. All contracts, therefore, which do not come within the statute, unless they are under seal, must be regarded as special parol contracts, and stand in the same situation which promissory notes did before the statute was made.

The contract set forth in the first count in this declaration is one of this character; being payable in the "currency of Zanesville," and not in money, without which it can not be declared on as a promissory note. 2 *Bibb*, 572, 585; 3 *Bibb*, 26, 76, 85, 115; *Lansing v. McKillup*, 3 *Caines*, 286.

Besides, the contract set forth in pleading in this case is liable to another objection; the payment depends upon a contingency which destroys its property as a promissory note, even if it was  
118] payable in \*money; for commercial transactions would be greatly embarrassed, if notes of this kind, incumbered with conditions, were permitted to circulate. It has been determined that a note promising to "pay a certain sum, or to render the body of

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I. S. to prison by such a day," is not a note on which an action will lie after failure to render the body; because it was not originally for the payment of money, but became so by matter *ex post facto*, 2 *Ld. Ray.* 1362, 1396; and where the note was to pay if another did not within a certain time, the same doctrine was held. 8 *Mod.* 363. The note in this case is payable, "provided the plaintiff does not within a limited time take the amount out in store goods," and can not be distinguished from the two last cases cited:

A third objection to the declaration is, that there is no averment that the note was not paid "in the currency of Zanesville," but the averment is that it was not paid in "*money* current in Zanesville," so that the breach is insufficient, for it should be assigned in the *words* of the contract. *Com. Dig. Pleader, c. 45, 49; 2 V. 2.* In common language, when we speak of the currency of a particular place, we mean bank notes, a currency different from that of other places, and different from specie, for if the words "currency of Zanesville," are synonymous with money, where was the necessity of specifying a particular currency. The value of bank notes depends upon the facility of payment, which can be obtained more readily from banks in the neighborhood than from those at a distance, and bank notes are often below par from other causes, which creates a difference in their value; and it would be destroying language and the law to conclude that the word "currency is synonymous with the word "money," but this point has been directly decided by Chief Justice Parsons, in *Jones v. Tales*, 4 *Mass.* 252. He held that the words "foreign bills," in a note did not mean money, and that they must be construed to mean bank notes, and consequently different in value from money.

By the COURT:

It is not necessary to decide whether the note in this case is or is not negotiable, or to adopt or reject the principles of the cases cited on either side; for if it were not negotiable within the rules of decision, we should nevertheless consider it a promissory note, importing in itself a consideration.

From the first settlement of the state, it has been a universal practice among all classes of citizens, in making contracts, for the party who has received a consideration, according to the terms of \*agreement, to execute a written promise to pay a sum of [119 money or other property for value received. Although the writ-

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ing thus executed may want words of negotiability, or may contain conditions that destroy its negotiable character, the promisee rests in security upon his written contract, as evidence of his claim, and preserves no other proof of the transaction upon which it was founded. By common consent, actions have always been brought and sustained upon such instruments without setting forth or proving the consideration. Were the court now to establish a different doctrine, great mischief might ensue: numerous judgments would virtually be declared erroneous—existing contracts might be seriously affected, and a rule would be established contrary to the common understanding and usage of the country. A door would be open for controversy, whether the note were any evidence of debt, or whether the whole original contract must be made out in proof by the plaintiff? This is required neither by justice nor by common sense. A principle once established and continued by common consent, and with general approbation, ought to be received as the law of the land. It should not, but for very weighty reasons, indeed, be departed from or overruled. In this case, we are of opinion that no such reasons exist.

The objection to the manner in which the breach is assigned, is not well founded. The term "currency" in a contract, must be taken to mean *current money*, unless there be something in the contract itself to require a different interpretation. The case in 9 Johnson is considered clear on this point.

Judgment reversed.

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 CAMPBELL v. HAMPSON.

No action lies against the sheriff for imprisoning a debtor in the same room with criminals, if the county jail contain but one apartment.

*Quære:* Whether such action may not be sustained against the county commissioners?

THIS case was certified from the supreme court of Muskingum county. It was an action of trespass, and was tried by a jury upon the plea of not guilty, who found a verdict for the defendant. The plaintiff moved to have the verdict set aside as against law. A statement of facts was made and agreed to by the parties, and the motion for a new trial referred for decision to this court.

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\*The facts stated are as follows :

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The plaintiff was arrested by the defendant on the 26th day of September, 1822, by virtue of a *capias ad respondendum* issued from the court of common pleas of Muskingum county, in favor of John S. Dugan, in an action on the case, and was in the lawful custody of the defendant as a debtor. The jail of the county of Muskingum contains but one apartment, which is used, and heretofore has been used, for the imprisonment of convicts, persons charged with crimes, and debtors, this being the only room or building appropriated by the commissioners for that purpose. And it also appeared in evidence that the sheriff had represented to the commissioners the situation of the jail, and requested them to make provision for the separate confinement of debtors. The defendant, on said 26th day of September, by virtue of said writ, took said plaintiff to said jail, and there imprisoned him in said apartment, which then contained two insane persons, one person charged with rape, and one with bigamy. The jail was described as a filthy and loathsome apartment, and the plaintiff protested against being confined there, and claimed decent and comfortable lodgings. The keeper of the jail treated the plaintiff with all humanity and gave him every accommodation, and kept the room as clean and comfortable as the nature of the place would admit. On the 28th day of September the plaintiff procured bail and was discharged.

GODDARD and SPANGLER, for plaintiff:

*First.* Was the imprisonment illegal?

*Second.* If illegal, is the plaintiff's remedy against the sheriff?

If the law supports the affirmative of both of those questions, we conceive a new trial must be granted. The first point was conceded, but to remove all doubt we will take a view of the law on the subject. By the common law, criminals and debtors shall be imprisoned in separate rooms. 3 Jacobs, L. D. 166; 2 Burns' Justice, 321; 3 Bac. Abr. 351. It will be found also, on an examination of the above authorities, that the sheriff is not bound to confine debtors in the public jail, but may in all cases, if he prefers so to do, imprison them in any other place within his county.

The above principles of the common law have been recognized by the Supreme Court of the State of New York. See 6 Johns. 22. The court then reasons by the analogy which exists between the ministerial duties of a sheriff and coroner, and decides that as it is

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121] \*the duty of a sheriff to provide a place for the confinement of debtors, when no place has been provided by the proper authority, so also it was the duty of the coroner in that case to have provided a place for the confinement of the sheriff (whom the coroner had arrested on a *ca. sa.*), instead of imprisoning him in the county jail. The statute of the state, providing for the "erection of public buildings" (13 Rep., sec. 1), appears to have been framed with a view to the above principle of the common law. It provides that every jail shall contain two apartments, etc., one for debtors, and the other for criminals. It will be found, from the common law authorities previously cited, that it is imperious on the sheriff to imprison criminals *at all events* in the county or common jail.

From those principles of the law we reason as follows: Debtors and criminals shall be imprisoned in separate rooms, or houses. But from the agreed statement of facts it appears that the jail of Muskingum county contained but one apartment, and the law (as we have shown) requires that *criminals* shall be confined there. Then where is the sheriff to confine debtors? Not with the criminals, for that the law prohibits. Here, then, we see the propriety of that principle of the common law which authorizes the sheriff to provide a place for the confinement of debtors. But the sheriff did not pursue this course, thus pointed out by the law of the land. He, in violation of the law, and of the rights of the plaintiff, confined him in the same room with criminals. This imprisonment we hope we have shown to be illegal.

It has been urged by the defendant's counsel, and (we believe) the court inclined to the same opinion, that it was imposing an unreasonable *duty and expense* on the sheriff, to require *him* to furnish a place for the imprisonment of debtors. To this we answer, that this *duty* appertains to his office, and is as old and well established as the office itself. We conceive that it was intended for the benefit of the sheriff as well as the debtor: for as a county jail might contain but one apartment, and that apartment be filled with criminals, and the sheriff subject himself to an action of trespass was he to imprison him therein, so a county jail may contain several apartments, and the sheriff may deem it insufficient for the safe keeping of the debtor and subject himself to an action for an escape, by imprisoning there. In the first instance, the law and the rights of the debtor require him to provide another place of imprisonment. In the other case his own interest requires that he should have the

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power of providing another place of imprisonment. As to the \*expense, it will be found by examining the act establishing [122 boards of commissioners (18 Rep. 169), that this and every other necessary county expense is to be paid by the county, and were the commissioners to refuse to allow an expense thus necessarily incurred, the sheriff could recover it by law. But it was observed by the court, that by the statute of this state, the commissioners, and they alone, had the authority of erecting jails; and therefore the sheriff had no alternative but to imprison debtors in the jail thus provided by the commissioners. The same objection might, with equal propriety, be urged in a similar case in England, as the sheriff there has as little to do with the erection of public jails as he has here. See 3 Bac. Abr. 345. Yet was the sheriff there to imprison criminals and debtors in the same apartment, he would forfeit his office, and be liable to the party injured in treble damages. 3 Bac. Abr.

In the case before cited from Johnson, the coroner might have with equal force urged the same argument, and probably did, yet he was liable for not having provided a place for the imprisonment of the sheriff. Thus it appears that the principle here contended for, and we say supported by law, does not depend on, neither has it any connection with the power of erecting public jails; therefore the foregoing objection consequently must fall. We ask, what would be the course for a sheriff to pursue, was there no jail erected within his county? Would he give the debtor his liberty because the commissioners had not erected a jail? If he did, the court knows he would be liable to an action for an escape. Here, then, comes in his common law power to his aid, of providing a suitable place, by virtue of his office, for the confinement of the debtor. And here again we see the necessity for this power. We say, then, that in the present case there was not in fact, or in law, any place provided by the commissioners for the imprisonment of debtors. The house appropriated by the commissioners for the county jail, contained but one apartment, and in that apartment the law required the sheriff to imprison criminals, and the same law forbids the imprisonment of debtors in the same room with criminals. It was then necessary for the sheriff to exercise the power with which the law clothes him, and provide another place for the imprisonment of the debtor, or, in violation of the law, imprison the debtor in the same apartment with criminals. He made his selection—he pur-

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sued the latter course, and thereby, we say, subjected *himself* to an action.

But it has been urged, that if the plaintiff has sustained an in-  
123] jury, \*his remedy is against the county, and not against the sheriff. This is the second point to be considered.

We conceive there is no principle of law better established than that he who commits a trespass, even should it be by the advice or the command of another, is the person liable to the party injured. 6 T. R. 300; 5 Burr. 2657; 2 Esp. 533.

He may, and probably has, his remedy over. And indeed, in this case, it is clear to our minds, that the plaintiff's remedy is against the sheriff only. We have endeavored to show that the law clearly pointed out a different course for the sheriff to pursue, than to imprison the plaintiff with criminals. If he, through ignorance of his duty and of the law, has committed a trespass, we can see no reason why the county should be liable. The commissioners may have neglected their duty concerning the erection of a jail, but that negligence can furnish no excuse for the sheriff, while he possesses the powers we have pointed out. The act providing for the erection of public buildings, before cited, provides, that "whenever the commissioners may deem it necessary, they shall cause to be erected," etc. Now was this suit brought against the county, the discretionary power lodged with the commissioners would, we think, be an effectual bar to the action. Because by the statute, the commissioners are not to erect jails until they deem it necessary. They have not deemed it necessary or expedient to erect a jail with two apartments, in this county, and in acting on this opinion (which probably was based on the poverty of the county) they have only exercised the discretion which the law gives them. For those reasons, we are of opinion that the plaintiff's remedy is against the sheriff, and against him only.

No argument was presented for the defendant.

By the COURT:

At the common law it was unlawful to confine a person in custody for debt in the same prison with those imprisoned for crimes, unless the debtor assented to it. If a debtor were thus imprisoned, he had his action for the wrong against the sheriff.

Our statute directing the erection of jails, provides that the jail

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shall contain not less than two apartments, one of which shall be appropriated to the reception of debtors; the other shall be used for the safe keeping of persons charged with or convicted of crimes. This provision is clearly predicated upon the principle that the unfortunate debtor is not to be associated with the unprincipled and profligate felon. And the court have no doubt but thus to associate \*a debtor is a wrong for which he may [124 have an action for redress—the difficulty is, against whom shall such action be brought?

The fact that this action is sustained, in England, against the sheriff, does not warrant us in sustaining it here. He has, with us, no authority to provide a jail, or to imprison a debtor in any other place than the public jail. It is the duty of the commissioners to erect and provide a jail. If this duty be performed—if there be a public jail with separate apartments, and the sheriff shall, in such case, confine a debtor among criminals against his consent, no doubt he would be subject to this action. But the facts agreed present a very different case. Here was a jail with but one apartment, and that contained persons charged with criminal offenses. The sheriff had legally arrested the plaintiff—he could not give bail, and it was the duty of the sheriff to confine him in the public jail. Had he imprisoned him elsewhere, it would have been illegal. The plaintiff, in the action, might have considered it an escape—the defendant a trespass. Where the sheriff acted in strict obedience to his writ, and in the performance of his duty, he shall not be subjected to an action. The plaintiff has sustained an injury from others, and must seek redress against the wrong-doers—not against the innocent sheriff.

The motion for a new trial is overruled.

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Defendant in chancery having answered to the merits, without objecting to the jurisdiction, and having obtained an order to stay the proceedings until the decision of another suit involving the same merits, shall not afterward object to the relief in equity that there is remedy at law.

Where a party has substantially, but not literally, complied with his contract, equity will interpose and aid him in obtaining justice.



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The bill was brought by the assignee of the vendor of a tract of land, against the purchaser, to obtain a decree for the balance of the purchase money, or a rescinding of the contract. The facts were these: Ludwick Wolfley, James Hunter, John Hunter, Morris Rees, Solomon Rees, Thomas Rees, and Noah Zane were proprietors in unequal proportions of sec. 11, T. 14, R. 19, situate in Fairfield county. The land having been entered at the Chilli-cothe land office, an agreement was made between the parties that the patent should issue to Zane, who gave a bond to each of the others to convey him his share of the land when the patent was obtained.

In June, 1810, before the patent issued, Solomon Rees sold his 125] \*tract of land to the defendant, Smith, as eighty acres, at eleven dollars and fifty cents per acre. Thirty dollars to be paid in hand; four hundred and thirty in September following, and the residue in three equal annual installments. The title to be made in September when the payment was made, and if not then made, Rees to give security for the title to be made in a reasonable time. Possession to be given to Smith in the ensuing October, if required. This agreement was reduced to writing, and executed by both the parties.

Upon this contract Smith paid forty dollars at the time of execution; two hundred and fifty dollars on the 27th of October, 1810, and one hundred and thirty in November following; and was put in possession of the land. Rees not having obtained a deed from Zane, in October, 1810, executed a bond to Smith for the title, with Thomas Rees and Jesse Rees as security, conditioned for making a title so soon as a regular survey could be made. Upon this bond the Reeses indorsed an order to Zane to make the title to Smith. The bond and order was presented to Zane, who indorsed upon the bond a promise and an engagement to make the deed to Smith.

After this a survey of the section was made, when it was found not to contain the full quantity. The proprietors all agreed to apportion the loss among themselves, allowing to Smith his full quantity of eighty acres.

In August, 1812, Zane, Smith, and all the proprietors, met for the purpose of executing and receiving deeds. By the consent of all concerned, Zane conveyed to Ludwick Wolfley, James Hunter, John Hunter, and Morris Rees, their several tracts of the land by metes and bounds. At the same time he executed a deed to Smith

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for the eighty acres purchased of Solomon Rees, the descriptive terms of which are as follows: "being part of section 11, T. 14, R. 19, containing eighty acres, the line to run on the south boundary of the said eighty acres so as to include the two small fields south of the road, and to run the line as near the said fields as may be practicable, so that the line including said fields may be a straight line—thence to run east and west for the basis of the said eighty acres. The body of said eighty acres lying north of the run near Solomon Rees' dwelling-house." Smith received this deed, and gave up to Zane the bond executed by the three Reeses, and upon which Zane had indorsed his agreement to convey to Smith. At the same time Zane executed to the heirs of Thomas Rees a deed for all the residue of the section, reserving for himself fifty-five acres eighty-six poles in the northeast corner.

\*These deeds Zane took with him to Virginia to complete [126 them by adding his wife's relinquishment of dower. When these deeds were returned, Smith took the one for him to his attorney, who advised him that it was too vague and uncertain in description to be valid; upon which Smith refused to accept it, and left it in the attorney's hands.

The balance of the purchase money remaining unpaid, in February, 1813, Solomon Rees assigned Smith's covenant to the complainant, and, Smith refusing to pay, the complainant brought suit at law upon the covenant. Smith defended the suit and resisted a recovery, upon the ground that Solomon Rees, not having executed the deed in September, according to the terms of the covenant, could not recover at law—and upon that ground obtained a verdict; after which this suit in equity was commenced.

Smith put in his answer without making or stating any objection to the jurisdiction of the court, and in his answer suggested that he was defendant in another suit in chancery, between other parties, in which the boundaries of the land were drawn in question, and praying that proceedings might be stayed until that suit was determined. An order was accordingly made to stay the proceedings, and they were stayed until the suit in question was decided, which settled the boundaries, as Smith, in his answer in that case, had claimed. This cause was then proceeded in to final hearing in the common pleas of Fairfield county, when a decree was made that the defendant should pay the balance of purchase money with interest. From this decree the defendant appealed to

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the Supreme Court, and the whole case was reserved for decision in this court.

No argument was submitted on the part of the defendants. For the complainant an elaborate argument was presented by Mr. Ewing. But as the principles relied on, and the reasonings urged, are substantially adopted by the court in the opinion, it is deemed unnecessary to report Mr. Ewing's argument.

Opinion of the court by Judge BURNET :

Two questions are presented in this case: 1. Has the court jurisdiction? 2. Has the contract been performed on the part of Rees, so as to entitle him to the relief prayed for?

As to the first inquiry, it is manifest that the subject matter of the contract comes properly within the province of a court of chancery. The defendant might have sustained a bill for specific performance, or to rescind; and it is contended with some force, [127] that this right \*must be so far reciprocal as to authorize the vendor to sustain a bill where the covenants on his part have been substantially, though not literally, performed, and the party claiming a strict performance, is in the full and secure enjoyment of the thing contended for. A punctilious performance of the *minutia* of a contract, is not always required in equity, though the want of it may present a difficulty in a court of law. If the conditions have been substantially performed, and the benefits of the contract fully secured to the opposite party, equity has considered it sufficient. But in this case the defendant, by answering and putting the merits in issue, has submitted to the jurisdiction, and the court, at this stage of the proceedings, may go on and decide as the equity of the case may require. He has not only acquiesced, but has obtained a stay of proceedings till the fate of another bill should be known, to which he was a defendant, and by which he might lose a part of the premises purchased of the complainant. The existence of that suit, and the possibility of a recovery, were relied on as an important part of his defense. The court so considered it, and he was indulged with a delay. That suit has been decided in his favor, and now, for the first time, an exception is taken to the jurisdiction of this court. To indulge the defendant in this course, would seem to be trifling with justice. It has been repeatedly decided, that an objection to the jurisdiction of chancery comes too late, after a defendant has answered and contested the

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merits. If he do not demur to the relief, the court will decree for the complainant on the hearing. Gilbert's History and Practice of Chancery, 219. In the case of *Ludlow v. Simond*, 2 New York Cases in Error, 56, this doctrine is asserted and supported, both by reason and precedent.

The twenty-sixth section of the act directing the mode of proceeding in chancery is also relied on. That section provides, "That after answer filed and no plea in abatement to the jurisdiction of the court, no objection, for want of jurisdiction, shall ever after be made, nor shall the court ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in cases of controversy respecting land lying out of the jurisdiction of such court." Without undertaking to decide how far this section will control or affect the provision contained in the second section of the same act, by which the chancery powers of this court are created and limited, we may safely say that in a case circumstanced like the present, it may be relied on with propriety and effect.

On the part of the defendant, it is urged that the complainant's \*remedy, if any exist, is at law; but we can not shut our eyes [128] on the fact, that the remedy at law has been extinguished by a judgment rendered against the complainant by a court of competent jurisdiction, on the ground alleged by the defendant, that Solomon Rees had not complied with his contract. The defendant having succeeded on that ground, now attempts to defeat the application here, by maintaining the converse of the proposition. The words of the statute defining the jurisdiction of courts of chancery, relate to the time of filing the bill. If the complainant has not then a complete and adequate remedy at law, it would seem that the legislature intended to afford him the aid of chancery; nor does there appear to be anything in the statute making it necessary to inquire whether at any former period a legal remedy did or did not exist. It is one of the peculiar provinces of equity to grant relief in cases of fraud and accident, and it is worthy of inquiry, whether both of these circumstances are not to be found in the present case. The defendant admits that, in the trial at law, he denied the existence of a legal remedy, and having succeeded in that defense, obtained a judgment. He now attempts to defeat the application on the equity side of this court, by advancing the converse of that proposition. Although he admits that the facts re-

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main as they were, he contends that there was a remedy at law, and that this court can not therefore grant relief. The accidental circumstance, that the plaintiff's remedy at law has been destroyed by the practice of the defendant, ought rather to strengthen than to weaken his claim to the aid of this court.

As the statute admits the jurisdiction of courts of chancery, in cases where there is not an adequate remedy at law, it is difficult to perceive how that jurisdiction should be affected by showing that a legal remedy once existed, which has since been lost, without the fault or laches of the defendant. It is alleged, and such appears to be the fact, that the plaintiff in the court below being an assignee, had no knowledge of the bond and security given by Solomon Rees to the defendant in October, 1810, or of the order on Zane for a deed, or of his acceptance of that order, which circumstance seems to account for his failure in the suit at law.

Circumstanced as this case now is, it must be admitted that the remedy at law, to say the least of it, is both doubtful and difficult, which has been generally considered as a sufficient ground for chancery to retain a cause.

In order to determine the second inquiry, it is necessary to attend 129] \*more particularly to the facts. By the contract of June, 1810, Solomon Rees was bound to deliver possession of the land in October, and to make the title deed in September, or to give satisfactory security that the same should be made in a reasonable time. It is admitted that possession was delivered, and that in October a bond was given, with security, to Smith, for the execution of the deed. At the time of the contract Smith knew that the fee of the entire section of which the land in question was a part, was in Noah Zane, in trust for Rees and the other proprietors. On the breach of the bond, Rees drew an order on Zane in favor of Smith for the deed, which order Zane accepted, and bound himself to execute the deed. Some time after, Zane, Smith, and the other proprietors met, and agreed on the manner in which deeds should be executed by Zane to each of the claimants, of which meeting and agreement the complainant appears to have had no knowledge. In pursuance of this agreement, Zane executed and delivered deeds to each of the parties for their respective shares. At the time Smith received his deed, or at the time it was executed, he gave up to Zane the bond and security given by Solomon Rees, together with the order on Zane and his acceptance. By the execution and delivery of these

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deeds, the whole of the land was disposed of, and from thenceforth it became impossible for the complainant to procure, or for Zane to execute to the defendant any other deed than the one which had been executed. By the agreement and the deeds executed as above, all the boundaries of the defendant's tract were fixed and certain, except the northern line, which has since been determined and settled by a decree of this court, according to the claims and pretensions of the defendant, who is and has been, since that decree, in the quiet and peaceable possession of the land. The description of the land, as contained in the deed to Smith, appears to be confused and uncertain; but that uncertainty may be removed by reference to the other deeds executed at the same time, and to the decree before mentioned.

The defendant alleges that when he agreed to the execution and delivery of the deeds, and when he accepted his own, it was with a mental reservation, that if his counsel did not approve of it, he would not retain it or consider it a discharge of the contract; which determination, however, was unknown to Zane or the other parties concerned, till after the delivery of all the deeds, by which it became impossible for the complainant to procure for him any other.

From this state of the case, it appears that the complainant has \*failed to show a literal performance of the contract, though [130 he has performed it substantially, and in the way assented to by the defendant. The bond and security was to have been given in September, but it was not furnished till October, when it was received without objection, accompanied with an order on Zane for a deed, in pursuance of which order a deed was executed and delivered, and the bond and accepted order given up to be canceled. This would not have been done, had not the defendant considered the bond as executed in time, and the execution and delivery of the deed as a discharge of its condition. Having thus received the security, and availed himself of it, a court of chancery will not lend a willing ear to a mere technical informality. Another objection is to the description of the land as set forth in the deed. This defect may be attended with some inconvenience on the ground of uncertainty, but it may be obviated and rendered certain by a reference to the deeds and decree before stated; and in addition to this consideration, we can not but perceive that the difficulty has been produced by the defendant's own conduct, and that it can not now be remedied either by the complainant or by

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Noah Zane. He saw the deed and agreed to accept it, and at the same time consented that the deeds to the other proprietors should be delivered, one of which conveyed to the heirs of Thomas Rees all the residue of the section not included in the previous deeds. The fee of the whole section having thus passed out of Zane, with the exception of his own tract, lying remote from the one in question, should the deed to the defendant be given up, as contended for, the title to his portion of the tract must vest in the heirs of Thomas Rees. This difficulty having been produced by the act of the defendant, without the agency or even the knowledge of complainant, it should not now be charged to his account, or made a pretext for withholding from him the consideration, which, it is admitted, he would have been entitled to, had the covenants on his part been literally performed. In equity, a substantial performance may be good, whatever objections it might be liable to in a court of law, and we are all of opinion that such a performance has been made out in the present case, and that so far as this performance has deviated from the letter of the covenants, the deviation is to be ascribed to the defendant himself.

We consider it no objection to the decree in this case, that it is for the payment of money only. Such decrees are frequent. The case of *Turner v. Dayton* and others, decided at the last term, in Champaign, is in point. The bill was filed for a specific performance. 131] The allegations of the bill were sustained, but Dayton having sold the land to his co-defendants, who had purchased for a valuable consideration without notice, a specific performance could not be decreed. The court, however, having become legally possessed of the case, refused to turn the plaintiff round, retained the cause, and under the general prayer for relief decreed to the complainant the value of the land, which was admitted to be the sum for which it had been sold, and which was then in the hands of the defendant, Dayton. It is true that in that case the court were influenced, in some measure, by the consideration that the complainant might affirm the sale and hold the vendor liable to account as a receiver.

As to the first objection, we are of opinion that, independent of all other considerations, the doubt and difficulty that would attend an application on the common law side of the court, would justify us in retaining the bill. Such circumstances are entitled to much consideration, and many cases are to be found in which they have

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been deemed sufficient to support the jurisdiction of a court of equity (see New York Cases in Error, 54, and the cases there cited); but when taken in connection with other matters existing in this case, they seem to place the question in a very clear point of light as to the second objection. It would be unjust and inequitable to permit the defendant, Smith, to hold and enjoy the land, and also to retain the consideration which was to have been paid for it. The title having been conveyed to him by the trustee, on the order of Rees, the complainant has effectually and forever lost the land, and we can not discover any outstanding title or claim that can affect or in any shape trouble the defendant. It would be equally unjust to permit him to take an exception to the form of the deed, when that form was the result of an agreement between himself and the trustee, entered into without the knowledge of complainant, and by which he has effectually put it out of the complainant's power to remedy the defect.

Upon the whole, we can not discover any valid objection to the decree prayed for in this case. Decreed accordingly.

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 \*MARSHAL KEY v. C. VATTIER.

[132]

Contract with an attorney that he shall prosecute suits for the recovery of property, and that no compromise shall be made except he join in it, to receive part of the property recovered as compensation, illegal and void.

THIS was an action of covenant reserved and certified for decision from the Supreme Court in Hamilton county.

The case stated in the declaration is as follows: "By a certain indenture made between the plaintiff and one James W. Gazlay, of the one part, and Charles Vattier of the other part, the plaintiff and said Gazlay, on their part, did covenant and agree with the defendant, among other things, to use their best skill and abilities as the attorneys of the defendant, to recover and obtain from one James Findlay and one Nicholas Longworth the possession of certain property in said indenture mentioned, in the name and for the use of the defendant," etc., specifying a great variety of real



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and personal property, "all of which, as is alleged in said indenture, had been unjustly taken from the possession of the defendant by said James Findlay and Nicholas Longworth, and other agents, and who then held the same, etc. In consideration whereof, the defendant did then and there, by said indenture, covenant to and with said plaintiff and said Gazlay, that whenever the possession of the aforesaid property should be recovered, or when any part thereof should be recovered, he, the defendant, would forthwith convey and deliver to the plaintiff and said Gazlay, in severalty, the one equal moiety thereof, to each the one equal fourth part of all or any part of the aforesaid property so to be recovered, and that he would give to each severally good and sufficient title to the same, such as he, the defendant, should have himself. And the defendant, by said indenture, did further agree with the said plaintiff and Gazlay, that if any compromise should be effected, the same should be the joint act and consultation of the parties to said indenture."

The declaration proceeded to aver that the plaintiff and Gazlay prosecuted a suit, which was referred, by consent of the plaintiff Gazlay, and the defendant, to arbitration. That the arbitrators awarded a large sum of money and certain specific property to the defendant, who had obtained possession of it. That he had been required to convey one-fourth part to the plaintiff, which he refused, etc., assigning the breach in the usual form.

To this declaration the defendant demurred generally, and the plaintiff joined in demurrer. The court of common pleas gave 133] \*judgment for the defendant, and the plaintiff appealed to the Supreme Court.

ESTR, in support of the demurrer:

This contract is against public policy, and upon that ground the demurrer should be sustained. It is a rule, both of law and equity, that *ex turpi contractu actio non oritur*. Whatever is contrary to the policy of the common law, or against the provisions of a statute, or repugnant to justice, or inconsistent with decency and morality, is sufficient to vitiate a contract and render it void. 1 Com. on Con. 31-33; Jones v. Randall, Cow. 38-40. And the same rule prevailed in the civil law. 1 Poth. on Obl. 126.

"All contracts and agreements for the maintenance of suits are illegal and void at the common law." "Maintenance is defined

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to be an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money, or otherwise to prosecute or defend it." It is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. 1 Com. Con. 34.

In the contract under consideration, the defendant is not only assisted with the means of prosecuting the suit, but he is to be at *no expense, and has not the power of settlement*. By the common law, therefore, it will not, I presume, be denied but that the contract is *absolutely void*.

Is it so by the law of Ohio?

It is: 1. Because the common law, so far, at least, as it is based on morality and the principles of sound policy, is in force in this state.

2. Independent of the common law, as such, the contract is void.

In considering the case of *Jones v. Randall*, 1 Cowp. 38, Lord Mansfield says: "It is admitted by the counsel for the defendant that the contract is against no positive law; it is admitted, too, that no case is to be found which says it is illegal; but it is argued, and rightly, that notwithstanding it is not prohibited by any positive law, or adjudged illegal by any precedents, yet it may be decided *so upon principles*, and the law of England would be a strange science, indeed, if it were decided upon precedents only." And so, indeed, would be the law of Ohio.

Let this contract, then, be tested by the *principles of sound policy*, and if conformable to them, enforce it; if not, declare it void.

The *peace of society* requires that strife and contention should be discouraged; it should, therefore, be the policy of every [134] well-regulated community to prevent all contracts which have a tendency to keep them alive. A contract would not be tolerated that impeded the due course of justice. And why? Because the good of society requires that no member of it should possess the power of enforcing an agreement calculated to obstruct the administration of justice. It is equally for the good of society that courts of justice should refuse aid or sanction to agreements directly tending to disturb its repose. In the contract before the court strong temptations are presented to engage in litigious controversies. The claims are numerous, large in amount, and the

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compensation the moiety of all that is recovered. A strong inducement is presented to the defendant to permit the adventurers to push their speculation, and to "pervert the remedial process of the law into an engine of oppression," by their stipulation to indemnify him from all expense. It may be said that a man may be poor, timid, or doubtful of success, and that unless permitted to make an agreement upon some such terms his rights might be lost. Without stopping to inquire into the justness of the argument as applicable to an individual case, let it be admitted that occasional instances may occur of the description mentioned; it is therefore legitimate to argue that every facility shall be afforded to adventurers and speculators, that ingenuity, whetted by avarice, can contrive, to stir up litigation, to vex, harass, and oppress, and to break in upon the peace of every neighborhood? Every general rule of law may be prostrated by such a course of argument.

But there is another and most objectionable feature in this contract. As if apprehensive that Vattier might grow weary, or from some other motive feel inclined to put an end to this formidable system of warfare, it was deemed prudent to tie his hands, and stop his mouth, and say that peace should not be made but by the *joint act of the parties*, the adventurers composing the majority.

Thus by this contract strife is not only stirred up and kept alive; the process of the law perverted as an engine of oppression; the plaintiff and his coadjutor to have half of all they can recover; the defendant to be indemnified against all costs and expenses; but he is absolutely prevented from discontinuing his suits, settling or compromising his claims. It is believed, therefore, that the contract declared on can not be sustained; that by the principles of public policy it is void, and that the defendant is entitled to judgment on his demurrer.

**135] \*GUILFORD and HAMMOND, contra:**

This case presents one single question for decision. Is an agreement illegal and void, by which a lawyer agrees to prosecute a suit for the recovery of property, to be compensated out of a part of the property recovered?

Such a contract would be void in England, and in some of our sister states, because the making a contract of this nature is prohibited by statute, and declared an offense subject to be punished criminally. This kind of offense is denominated champerty and

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maintenance, and as such is described in the books. In Ohio, the legislature have not deemed it sound policy to create or define any such offense, or to attach to the fact itself any punishment or other mark of reprobation.

It is the province of the legislature to prescribe the rule of individual conduct, not that of the court. Sound discretion and considerations of policy belong to the exercise of legislation—interpretation and application to the court. Nothing can be more distinct than legislative and judicial functions, and whenever a court take upon themselves to supply legislative omissions, they depart from their proper sphere of duty.

The right of making contracts is a high personal privilege of the citizen. The legislature may restrain this right where, in their views, the public safety or the public good requires it; but no other power in the state can restrain it. It is especially the province of the courts of justice to enlarge and protect this, as well as every other personal right. Should the court enter into discussions of public policy, and on that ground restrain the privileges of contracting, where the legislature have not restrained it, and where public morality is not involved, it would be setting a dangerous precedent, and introducing a present mischief—that of assuming legislative powers.

If, however, this inquiry and examination is to be gone into, how does the matter stand upon principle? It can not stand upon authority, for the foundation upon which all the authorities rest, the law declaring it an offense, does not exist in Ohio. Where there is not the same cause, there can not be the same consequence.

The English books, ancient and modern, abound in denunciations against champerty. Coke calls it the most odious species of maintenance. Blackstone informs us that the practice is greatly abhorred by the law of England, and describes those who engage in it as the pests of civil society, referring at the same time to the severities inflicted upon champertors by the Roman law, in support of his own assertions. And in treatises upon contracts, champerty, as matter of course, is stated as one cause for holding a contract void.

If we could consider the subject abstracted from the impressions we receive from these denunciations, we would feel none of the abhorrence here spoken of. An individual placed in the power

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of unfeeling and rapacious men, is illegally and oppressively stripped of his property, and turned, with his family, destitute, desolate, and helpless upon the world. A lawyer proposes to investigate his case, to prosecute his claims, and restore him to his rights, at his own risk and charges, and to receive compensation, if any, out of the amount recovered. Is there anything abhorrent to humanity or repugnant to justice in this? It can not be pretended. The effect is to be produced by reversing the picture, and affixing to the transaction the character deduced from its darkest shades, when abused and applied to the purposes of mischief. An innocent and unoffending man may be vexed and harassed by unfounded and malicious suits, until, in mere weariness and exhaustion, he shall buy his peace. This may be done. And every personal right may be and is abused. That furnishes no reason why its nature and character shall be estimated only by its darkest side—its fair, beneficent, and useful traits of character excluded from sight, and its exercise restrained in regard to the fact that it may be mischievously employed.

If we trace the established doctrines, in England, upon this subject to their source, we shall find nothing in their origin or object to recommend them to our adoption

Rome is, to be sure, called a republic, but we know that it was a tremendous and despotic military aristocracy—and that the ruling men in the state disposed of property in the most arbitrary and tyrannical manner. Estates frequently rested not upon legal right, but upon present power. It was, therefore, of the utmost importance that the right of the present possessor should remain unquestioned. Nothing could be more consistent than the enactment of highly penal laws against such as should presume to pry too closely into the foundations of property, or attempt to set up right in opposition to actual possession.

At the early common law, it was held to be an offense against public justice for any man to aid or assist another in matters pending before a court of law. We trace this principle to about the close of the eleventh century, when the Norman conqueror, having subjugated the country, and despoiled the natives of their property, divided all the lands in the kingdom into sixty thousand knight's fees, and distributed them among his followers. The principle was well adapted to the occasion. Indeed, it was

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a most appropriate maxim during the whole period that the violence and injustice of the feudal system prevailed.

Two hundred years after the conquest, the incongruous and heterogeneous parliament of Edward I. enacted the first statute against maintenance and defining champerty. The unsettled state of property resulting from the assumption of estates by the crown, for forfeitures and escheats, and the regranting those estates to the followers and favorites of the monarch, rendered such a law indispensable to the safety of the parties in possession.

It was in 1538, that Henry VIII. completed the suppression of the monasteries in England, and proceeded to escheat their estates and grant them to his courtiers and parasites. In 1540, he suppressed the order of the Knights of Malta, and seized and disposed of their estates and revenues. Here was another urgent occasion for strengthening the arms of violence and wrong in possession, against right and justice dispossessed. And accordingly, in this very year (32 Hen. 8, chap. 9), we find parliament enacting and confirming the statutes against maintenance and champerty, and declaring it unlawful to purchase any estate, unless the vendor or the person under whom he claimed had been in possession within one year preceding the purchase. The object and the policy of this statute, at the time it was enacted, is manifest. But there can be no such object, no such policy in Ohio.

Under these statutes and the common law, of which they are held to be affirmative, jurists imbibed their ideas of champerty. The courts of justice decided that it was unlawful for a master to pay counsel out of his own money, or to speak at the bar for his servant. 5 Com. Dig. 16. It was even decided unlawful for a friend, without compensation, to prosecute the business of a widow, in settling her deceased husband's affairs. Dyer, 355, B. And these decisions make no distinction whether aid is afforded in support of right and justice or in the furtherance of unfounded and vexatious litigation. As the subject matter of the contract was declared to be unlawful, it was inevitable that the contract itself should be deemed invalid. But neither the common law, nor the statutes upon this subject, have ever been in force in Ohio. If this contract be void, it must be for a reason different from that upon which similar contracts have been held void elsewhere.

This contract is said to be against sound policy. What is meant

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138] \*by sound policy, as the terms are employed in this argument? The decencies, proprieties, and charities of life, that constitute public morals, exist in society, independent of considerations of policy, and without the aid of positive institutions. A contract to do an act against which the moral sense of society revolts, as degrading and disgraceful, can not be enforced in a court of justice although no positive law forbid the action. Contracts for prostitution or for the establishment of brothels are of this character, and, in the progress of society, others of similar tendency may be made. But contracts, in respect to subjects that do not and can not affect the public morals, in this sense, can not stand upon the same ground.

Sound policy, in a political view only, can mean nothing but prudential maxims of government. When the legislator is about to act, it is his duty to examine what is proper, prudent, expedient. When the law is enacted, it prescribes the *public policy*. In applying the law, the judge can set up no other *policy* than that which the legislature have declared in the statute he has before him. Where there is no common law, the maxims of which may be considered as declarative of public policy, in the light it is to be here regarded, the enactments of the legislature alone can decide what individual act or contract it is sound policy to prohibit. If an act have no indecent or immoral tendency, and be not prohibited by the legislature, it is not for the courts to say that a contract to perform that act is void, because against sound policy. It is necessary, at the outset, to establish a rule by which we may decide what is or is not sound policy, before we can declare a contract void as against it. We say that an act can not be against sound policy, which no statute prohibits, and by which no individual sustains an injury. We do not see how a different proposition can be maintained.

The legislation of the state is not silent on this matter. It has been considered and acted upon, and consequently the public policy with respect to it made known. The twelfth section of the act for the punishment of certain offenses, is in these words: "If any judge, justice of the peace, clerk of any court, sheriff, constable, attorney, or counselor at law, shall encourage, excite, and stir up any suit, quarrel, or controversy between two or more citizens of this state, whereby any citizen shall be defrauded and injured in said suit, quarrel, or controversy," such person shall be fined or

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imprisoned. The policy of this provision is every way more equitable and just, and better adapted to our principles of government and state of society than the doctrines of champerty and maintenance deduced from the common and statute law of Edward I. and Henry VIII.

\*In the first place, the act subjected to punishment is that of [139 encouraging, exciting, and stirring up suits, quarrels, and controversies, "*whereby any citizen shall be defrauded and injured.*" This excludes the absurdity of making it criminal for one citizen to aid another in obtaining right and justice. It only reprehends the infliction of injury—but he whom the law adjudges a wrong-doer can not by the same law be deemed an injured person. If a contract be made, whereby one agrees to encourage, support, maintain a suit or controversy by which injury is done to others, such contract could not be enforced. It would be pronounced invalid as against the policy of this statute. But a contract like this, entered into to aid and support a controversy, in which right and justice has been done, can not be against public policy in Ohio, because it contravenes no law and inflicts no injury.

In the next place, this section does not imitate the legislation of dark and arbitrary ages, in an attempt to sever the social relations. It does not forbid those whom bonds of affinity and ties of duty unite in feeling and in interest, from aiding and encouraging each other in their respective controversies and lawsuits. It leaves them to obey the dictates of nature, and the feelings of humanity; and inflicts punishment only upon those who do injury in violation of the duties of public trusts, which they have taken upon themselves to discharge. This is a declaration of the public policy of Ohio upon this subject by the only competent authority. The courts of justice ought not, can not declare another and a different policy.

Our situation and modes of doing business are totally different from those of the countries in which the notions about champerty and maintenance had their origin. *Nemo alieno nomine lege agere potest*, "was a maxim of the Roman law, and at the ancient common law an attorney could not appear in a suit without a special license under the king's letters patent." This was consistent with the doctrines they held as to maintenance and champerty. But we make it a part of our system that the rights of parties shall be prosecuted and defended in our courts by men purposely educated



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and instructed for that employment. They come into our courts as matter of right, in the name of others, to defend or prosecute suits. It is a separate, distinct business, a profession. We consider it as reputable, and at the same time recognize that it is stipendiary in its character—nay, we do not hesitate to enforce contracts for a compensation. Upon what consistent principle can we adopt the maxims of other countries, and other times; or how shall 140] \*we limit the subject of contracts for compensation, otherwise than to transactions prohibited by law, or immoral in their nature?

An individual conceives that he has a claim of right to property. He states his case, and asks the opinion of counsel. It is given in favor of the claim. He then asks, upon what terms will you prosecute this business? The notion seems to be, that it is lawful to make one kind of bargain, but unlawful to make another. The counsel may stipulate to commence a suit, to prepare the pleadings, to take the depositions, to have the witnesses summoned, and to advance all the money necessary to effect these purposes. The party may stipulate to pay a sum certain to the counsel by way of compensation. The contract thus made would be obligatory. But should the party say I am poor, I have not the means of prosecuting this claim—if I do not succeed in the suit I can not even pay the costs—then no contract can be legally made—nothing can be done, unless the lawyer will prosecute the suit gratuitously, and at his own risk.

The rule, maxim, principle, no matter what it is called, that makes void a special contract, in which a lawyer prosecutes a suit at his own costs, to receive compensation out of the subject recovered, must have the same effect upon an implied contract, when the lawyer is distinctly informed that he can receive neither compensation for labor employed, nor money expended, except out of the subject in controversy. If he prosecute the suit, and succeed, he can only claim remuneration upon a contract implied—and this contract is invalid, because it is infected with the fact that he expected to receive nothing unless there was a recovery, and out of the subject recovered. Nothing but the clearest provision of positive law, or the binding force of long-established precedent can warrant such a decision.

If a man may lawfully stipulate to labor for compensation, he may stipulate to receive the compensation upon any condition not

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unlawful, or immoral, and out of any fund or article legally the subject of contract.

Where the safety, security, or possession of property is in jeopardy, and is secured by the exertions of others, the owner is better able, and is always more willing to make liberal compensation for the actual labor, than if the property were lost. Where labor, or enterprise, in the service of others, is successful, the party that performs it expects a higher reward than if it had been unavailing. This feeling enters into all the concerns of men, and operates upon all their actions. Full scope is given to it in agricultural, [141 commercial, and mechanical pursuits; and no sound reason is perceived for withholding its stimulus from those employed in the management of legal controversies.

Our laws manifest no abhorrence of the transfer of choses in action, or of rights not in possession. They provide for the first in many instances, and they leave the latter to be bought and sold upon the same footing with rights in possession. The validity of a conveyance or contract for the sale of lands, does not depend upon the fact whether the vendor be in possession, whether he ever was in possession, or how long his possession may have been divested.

As there is no law forbidding the sale of rights not in possession of the vendor, so neither is there any law regulating the terms and conditions upon which such sale may be made. If there is nothing illegal or immoral in an absolute sale, there can be nothing illegal or immoral in a conditional one. It must be every way as competent to make payment in the performance of service, and in the discharge of expenses incurred in prosecuting a suit to recover the subject, as to make payment in any other property or service. It is as lawful to purchase part as to purchase the whole.

In the case in hand, it is agreed that the plaintiff might lawfully engage to aid the defendant in the prosecution of suits against Findlay and Longworth for a reward—that there is nothing illegal, immoral, or against public policy in making such a contract. It is agreed that the plaintiff might legally have purchased the whole right claimed by the defendant, and have prosecuted suits in his own name to recover it. In other words, the plaintiff might lawfully sell his professional services to the defendant, and might also legally purchase the whole subject of claim. But the services

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can not be given direct in part payment for the claim—nor can a part of the claim be given as compensation for the services. Either is a lawful subject of contract between the parties; but they can not be bartered against each other. Surely no force of preconceived opinion can secure to so palpable an absurdity the color of reason or justice.

From the commencement of our jurisprudence, the legal profession have been in the habit of stipulating for conditional and contingent fees very frequently, where the plaintiff is a party, to be paid out of the sum recovered, and in proportion to the amount. A contract to this effect is, in principle, not distinguishable from that under consideration. If the counsel agree to adventure any-  
142] thing \*upon the result of the suit, the consequence must be the same whether he adventure much or little. If he may lawfully labor in the collection of money for a per cent. upon the amount recovered, he may lawfully prosecute a claim for land, to receive a part of it. If he may lawfully adventure his labor for a compensation out of the subject, he may lawfully adventure his money. If he may agree to pay a part of the expenses, he may agree to pay the whole. If he may legally acquire any interest in the result of the suit, there exists no rule to limit the extent of that interest.

When the principle is properly investigated, it will appear that every lawyer of the state, who has been engaged in tolerable business, must have made contracts in principle liable to the same objection as this. It has been a very common mode of contracting, both in Ohio and in a neighboring state. The most distinguished members of the profession, men of the most unsullied character, and who have filled the highest offices in the state, have made these contracts without reproach from themselves, or from others. Is not this strong evidence that they have not been considered *mala in se*, that they contain nothing iniquitous, nothing *contra bonus mores*, nothing of moral turpitude? But that, on the contrary, they have been deemed fair and mutual, as beneficial to the parties concerned as any other contract. As no law forbids the making of this contract, as it is founded upon nothing immoral, as it has produced no injury, we can not suppose that it will be pronounced void, because similar contracts, in other countries, where different laws are in force, have been so considered.

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Opinion of the court by Judge BURNET :

This action is brought on articles of agreement, executed in October, 1816, between the defendant, Charles Vattier, of the first part, and James W. Gazlay and Marshal Key, attorneys at law, of the second part. The contract, after reciting that the said Vattier had been formerly in possession of, and then claimed title to sundry tracts of land, and also to sundry notes, bonds, bills, goods, chattels, and moneys, to a large amount, which had been unjustly taken from his possession, provides that the said Vattier, with a view to have the said property recovered, and in consideration of the covenants on the part of the said Gazlay and Key, constitutes them his attorneys, with power, in his name, to sue for the property, etc., and to take all legal means to recover the same; and that when the same, or any part thereof, be recovered, the said Vattier shall convey to them an equal moiety, \*and deliver [143 to them, in severalty, each, one-quarter or fourth part, with such title as he may have. The plaintiff and Gazlay covenant to use their best skill to recover possession of the property, and to save and keep Vattier harmless of and from all costs and charges, in consequence of their prosecution of the same, and if any compromise should be effected, Vattier stipulated that it should be the joint act and consultation of the parties; and the parties bound themselves in the penal sum of one hundred thousand dollars. The defendant demurred generally to the declaration.

The court are now to decide, whether this contract amounts to champerty and maintenance, and if it does, whether an action can be sustained on it in the courts of this state.

The first question seems to admit of no doubt. The object of the contract was, by action or actions in the name of Vattier, to recover property in the possession of third persons, who held it by claim of title. The plaintiff and Gazlay covenant, as attorneys at law, to institute and carry on the suits. They are bound to defray the cost, and as a consideration for their services, they are to receive an equal moiety of whatever may be recovered; and Vattier engages not to settle or compromise the claims without their consent.

Champerty is a bargain with plaintiff or defendant to have part of the land or other thing sued for, if the party that undertakes it prevail therein, whereupon the champerty is to carry on the party's suit, at his own expense. 1 Inst. 368; 4 Blac. Com. 135; 5

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Com., title Maintenance A; Jac. L. D., title Champerty. Every champerty implies maintenance. 2 Inst. 208. Maintenance is an offense that bears a near relation to barratry, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise, to prosecute or defend it. It is an offense against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. 4 Blac. Com. 134; Hawk. P. C. 249; Do. St. 203. The punishment by common law is fine and imprisonment. 1 Hawk. P. C. 255.

The contract in this case shows that the plaintiff was to intermeddle in the suits of Vattier, by assisting him with his services, and by the payment of cost, which comes most unquestionably within the definition of maintenance. In addition to this, the plaintiff and his partner, in consideration of that intermeddling, are to receive a moiety of the land, or whatever else may be recovered. These facts most unequivocally constitute the offense of champerty.

144] \*The next inquiry is, can this action be sustained? In this state we have no general statute prohibiting or punishing champerty, and the common law, in relation to the punishment of crimes and misdemeanors is not in force. But although this be the case, it by no means follows that they may be lawfully and innocently practiced, or that the aid of the state tribunals may be had, to sanction and enforce them. The contract between these parties is against public justice, and such engagements have always been considered as injurious to the peace and happiness of the community. The nature and moral tendency of actions can not be effected by the manner in which the law treats them. If they be in their nature injurious, they must be considered offenses, whether the state has thought it necessary to punish them or not. Human legislatures act in subordination to the great Lawgiver. They can not change the nature of actions, or make them intrinsically right or wrong. There are many misdemeanors in this state for which no punishment has been provided, probably because the legislature have supposed that the influence of public opinion would be sufficient to suppress them. In such cases as the one now before us, they might naturally believe that public opinion, aided by the want of a legal remedy to enforce contracts, would afford all the remedy required. However this may be, it is believed that by omitting to provide a punishment in all cases of champerty and maintenance,

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they neither intended to afford them their sanction, nor to open their courts for their protection and encouragement. Every author that treats on the subject tells us they are against the common law. Wood's Inst. 413; 2 Inst. 208; 4 Blac. 135; Com. Cont. 173.

By the common law, persons guilty of maintenance may be indicted, fined, and imprisoned, or compelled to make restitution by action; and a court of record may commit a man for an act of maintenance done in the face of the court. 1 Inst. 368; Jac. L. D., title Maintenance. That a court of common law should be required to enforce a contract against the common law, and for which it provides a punishment, would be mysterious; and it would be still more so, that while they are enforcing such a contract, by sustaining an action on it, they should also sustain an action against the plaintiff in that cause, and compel him to make restitution to the party injured by that contract, and that, too, on the ground of its illegality. The inconsistency of such a course is still more strikingly illustrated by the concluding part of the authorities last cited, by which it appears that a plaintiff, in a suit like the present one, may be committed by the court for a contempt, by attempting, in [145 their presence, to perform the services that constitute the consideration of the contract on which he sues. Or, in other words, that a transaction, so palpably illegal as to be punishable, if attempted in a court of justice, may, when performed, become a sufficient consideration to support an action. To render a contract legal, the subject matter of it must be not only physically, but morally possible. An agreement can not possess an intrinsic, obligatory form, or sustain an action, in a court of justice, unless the subject matter of it be a thing about which the parties have a legal right to stipulate at their pleasure. An agreement, therefore, to do a thing in itself unlawful, must be void; for it would be absurd, that an obligation which derives its sanction from the law, should create a necessity of doing an act which the law prohibits. Let these principles be applied to the case before us. The plaintiff covenants to maintain the defendant in sundry suits at law, in consideration of which the defendant agrees to give him the moiety of whatever may be recovered. This covenant, on the part of the plaintiff, is a condition precedent, and must be performed to entitle him to his action. In other words, the law requires him to prove that he has done an illegal act, as a legal consideration to sustain his action; for if the

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action be sustained, the plaintiff must aver and prove that he has maintained the defendant, which is an offense at common law.

Two reasons are assigned, by Powell on Contracts, why an act undertaken against law is void. First, because when the object of a contract is against a man's duty, it may be presumed that he did not give it his free assent. Second, because the law, by forbidding the act, takes from the contractor the power of obliging himself to do it; and from the opposite party the power of requiring it to be done. In the case before us, the consideration must be done in order to sustain the suit. If the suit can be sustained, the defendant must have the power of requiring the performance of the consideration, which is illegal.

There are a variety of cases which show by analogy, that this action can not be sustained. Marriage brokerage bonds are void, because they are against the public welfare. Contracts are void if their consideration be illegal or unconscientious. Esp. Dig. 88, 94; Cowp. 793. A bond given to a sheriff to continue a true prisoner is void at common law, because it may be used for the purposes of oppression or extortion. A bond to an alien enemy is said to be void, because it is against public policy. All contracts 146] against any rule, \*or maxim of law, are said to be void, and the very case now under consideration, to wit: an agreement for unlawful maintenance, is given as an example of a contract which is void, because it militates against the public welfare. Pow. 173. Contracts like the one before us are said to be the most odious species of maintenance; should they be sustained, they will probably become frequent. The prospect of obtaining a large amount of property as a consideration for professional services, and the risk of an inconsiderable bill of cost, form a strong temptation to speculate in lawsuits. It may induce men to purchase the right of instituting suits on trifling pretenses, for the purpose of forcing defendants to injurious and ruinous compromises as the most effectual means of purchasing peace. Suits may be brought in succession against an individual, until his patience is exhausted, and he is reduced to the terms of his oppressor. The ignorant and the weak will be constantly liable to be practiced on; unreasonable portions of their just demands may be obtained on the representation of difficulties and risks that have no real existence. The injunction of sacred writ which gave rise to the imparlance, and which invites us to agree with our adversary, will be impeded in

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its operation. The parties originally interested, and who but from the merits of their claims will be prohibited from settling them, are forced to continue their legal warfare till the expectations of some greedy champertor are fully satisfied.

Such practices are oppressive on the parties immediately concerned. They have an injurious effect on the community at large; they are against the policy of the law, and ought to be suppressed.

The counsel who argued this cause have manifested their usual ingenuity, and it is due to them, as well as to the case itself, that we deliberately examine the grounds they have taken. It is assumed by them as an admitted point, that champerty and maintenance are not offenses in Ohio. If by this we are to understand merely that they are not generally punished by indictment, the position will be granted; but it can not be admitted that they are not offenses in the eye of the law. The authorities before cited show that they are. Offenses do not become innocent when the law forbears to punish them; the moral character of actions remains the same, whatever may be the punishment provided for them.

It is admitted that the legislative and judicial departments are distinct. It is the province of the one to prescribe, and of the other to enforce the law, and neither has the right to exercise the powers \*of the other. We also admit that the right of mak- [147 ing contracts at pleasure is a personal privilege of great value, and ought not to be slightly restrained; but it must be restrained when contracts are attempted against the public law, general policy, or public justice. It is also alleged that such contracts were never considered as *mala in se*. This will depend on determining whether they be perfectly indifferent in themselves, or whether they involve any degree of public mischief or private injury. If the latter, they must belong to the class of actions denominated *mala in se*, as this appears to be the distinction recognized by the best writers on criminal law. These writers tell us that maintenance is an *offense against public justice*; that it perverts the remedial process of the law into an engine of oppression; that it keeps up strife and contention. The Roman law denominated it the *crimen falsi*, and the common law punishes it by fine and imprisonment. It can not, therefore, be indifferent in itself,



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and it must be attended with public mischief as well as private injury.

That such contracts have been frequent proves nothing of use to the plaintiff. We can not resort to the maxim *communis error facit jus*; it has no application to a case like this. But we apprehend that such contracts have been less frequent than the gentlemen imagine. By this contract counsel stipulate, as a compensation for their services, that they shall receive a moiety of all they may recover. They are to indemnify the plaintiff against costs, and he is bound not to settle or compromise without their consent. If such contracts have been common, we have yet to learn the fact. It is to be hoped, however, the counsel have been misinformed; but if not, it is certainly time the law should give a check to such a practice.

We have been carried back to the origin of laws against maintenance and champerty. They have been traced to the violence of the feudal system and the despotism of rapacious conquerors. This may, in part, be true. Some of the finest principles and rules of the common law took their rise under the same system, and grew out of a state of things that has ceased to exist, and some of them from circumstances that have long been forgotten; but this is no argument against their policy or their obligatory effect. It was admitted in argument, that if such a contract be attended with injury to an individual it is void, but not otherwise. Without stopping to point out the actual existence of such injury, we remark that the law does not usually wait to ascertain the consequences of actions in every particular case, in order to determine their character. Experience enables us to judge of the natural tendency of any particular class of actions, and when that teaches that they are generally unnecessary, mischievous, and impolitic, the law will fix their character and determine them to be against public policy, without waiting to measure the quantum of injury resulting from each particular case. This precaution, however, has been required by the legislature in a case like the present, when it is to be punished by indictment. The fact of the injury renders the act indictable—in the absence of the injury, the matter is left as it was at common law.

The existence of a distinct class of men, whose profession it is to prosecute and defend the controversies of others, is also urged as a reason against the doctrine on which the defense in this case

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is predicated; but we do not discover the force of the inference attempted to be drawn from this fact. It is admitted on all hands that in England, in New York, in Virginia, and in other states, the contract before us would not only be void, but would be punishable by indictment—yet we find the same class of professional men existing in those states, constantly employed in prosecuting and defending for their clients. The nature of their employment and the character of their engagements are not found to be incompatible with the doctrine in question, nor can we see why such incompatibility should be found in the State of Ohio. The rule contended for may prevent professional men from oppressing the unfortunate, and extorting unconscionable fees from the weak and the timid. It may prevent them from stirring up suits, and prosecuting claims which have neither law nor equity to support them, depending for success on the loss of testimony, the treachery of memory, or what has been denominated the glorious uncertainty of the law. It may prevent them from carrying on one suit after another against the same person, for the purpose of hunting him down and driving him to sue for peace on any terms; but it can not interfere with the fair and legitimate practice of the profession, as the experience of Great Britain, New York, and other states testifies.

It is not uncommon for counsel, in the zeal of argument, to resort to extreme cases as a test of principle. This has been done in the case before us. The imagination has been put on the stretch to get up a case in which the rule might prevent the prosecution of a meritorious claim. But if such a case exist the plaintiff can take nothing from the fact, nor can we admit the propriety or safety of such a course of reasoning. A case may be supposed in which great good would result to the community, from permitting [149] a private citizen to take the life of a culprit running at large, but such a case furnishes no argument against the policy of punishing murder. A man may be reduced to the alternative of starving or stealing, yet the gentleman would not urge this as a reason for repealing the statute against larceny. A debt justly and honestly due may be lost by the statute of limitation, yet a knowledge of the fact has not led to a change of the policy on which those statutes are founded. It may, therefore, safely be admitted that the rule in question may operate injuriously on some particular individual, as such an admission will neither contradict the existence

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of the rule, nor shake the policy on which it is founded. Experience teaches us, however, that such cases are extremely rare, if they ever exist. An oppressed citizen, with merits on his side, will seldom want an advocate. A large proportion of the members of the bar have humanity enough to redeem the profession from the imputation which such a case would cast on the whole corps; and we know of none whose benevolence would with greater certainty lead them to espouse such a cause, than the gentlemen who urge the possibility of its existence.

The argument drawn from the practice in common life, of stipulating a reward for labor, or enterprise, in proportion to its success, if carried to its full extent will destroy its own effect. It necessarily leads to the removal of every obstruction to the practice of the law, as a profession, and condemns the statute regulating the admission and practice of attorneys. The same policy which permits men in their ordinary business, to stipulate for contingent rewards, throws open every branch of useful industry; but this is not the case in affairs of legal controversy. The practice of the law can not be pursued as a business, at the pleasure of any individual. The right must be acquired in a particular way, and when acquired, must be pursued according to certain rules, or it will be forfeited. Why, it may be asked, do these impediments exist when they are not to be found in the ordinary pursuits of life? The answer is at hand: public policy requires them—the peace and quiet of the community require them—legislatures and the safety of parties litigant require them. We find, then, a rule existing in the administration of justice, and in matters of legal controversy, the propriety of which every man acknowledges, but which has no existence and would be unjust in the ordinary pursuits of men. If this distinction be correct, as it certainly is, what keeps us back from the conclusion that a similar difference may

150] exist, as to the \*right of making contracts of a particular description. On this head it may be sufficient to say that the whole history of judicial proceedings teaches that there is a difference in the effects produced on society by contracts for contingent rewards, made by attorneys with their clients, and those made by other men in their common business, and that this difference is sufficient to require a different rule. Were it otherwise the discovery would have been made long before now. It would not have been left to the ingenuity of counsel concerned in this cause to bring it to

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light. The experience of ages, in countries and states where the principle has been recognized and acted on, would have discovered its fallacy, and it would have been exploded.

Great stress is laid on the supposed fact, that the legislature of Ohio have forbore to legislate on this subject. That they have not said to their courts in a case like this, thus far shalt thou go and no farther, and here shall thy power cease. For a moment admit the position, and what will it lead to? Neither more nor less than that they were satisfied with the common law as it stood, which declared the contract void, and did not think it necessary to super-add in all cases a punishment, by way of indictment. As it had been decided that the common law, although in force in this state, in all civil cases could not be resorted to for the punishment of crimes and misdemeanors, the legislature have provided that a certain species of barratry may be punished by indictment. The fair inference to be drawn from the fact is, that they did not believe it necessary to punish that offense generally by fine and imprisonment, but are willing to trust to the remedy which the common law applied, and which their courts could in part enforce. They might very naturally suppose that the invalidity of the contract, coupled with the power which their courts possessed of punishing acts of champerty done in their presence, as contempts of their authority, would be sufficient to suppress the mischief. But will the gentlemen agree to adopt this course of reasoning in all cases? If we are to look to the statute book as the depository of all the law which we are at liberty to apply, in the administration of justice, what solitary case can be conducted, on legal principles, to a final judgment. Where are we to find the rules of evidence, and those by which contracts are to be construed and enforced? Where is our guide in the application of remedies to particular cases? There is a remedy by the act of the party injured—a remedy by the act of all the parties concerned—a remedy by operation of law, \*and a remedy by civil suit in courts [151 of justice. If these can be applied no farther than they are to be found in our statute book, if that alone is the depository of our powers and the manual of our practice, we should soon find the wheels of justice stopped, and injuries without number would go unredressed. There must be rules of law not to be found in that book and courts of justice must have the power of enforcing them, whether they have been formally recognized by the legislature or

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not. The want of such a recognition is not of itself a proof of their non-existence. But some inference may be drawn as to the understanding of the legislature, from the terms they have used in the twelfth section of the act which has been quoted. They do not declare it an offense to excite lawsuits, nor do they prohibit it by express bonds. They merely define the punishment that shall be administered, on a conviction by indictment, taking it for granted that the act was in itself illegal. If they had considered the section as creating a new offense, it is probable they would have used the language which is common on such occasions. But without laying any stress on this circumstance, we may safely infer that the existence of the law is no proof of a legislative opinion that such contracts as the one before us were not void at common law.

We admit it to be the policy of our government, that property, illegally withheld from the rightful owner, should be restored. For this purpose courts of justice are established and laws ordained, and if it could be shown that champerty and maintenance were necessary to the due administration of justice, we might be induced to believe that they ought to be encouraged. Our earliest impressions, however, have been that they are not only not necessary, but are highly pernicious. These impressions continue, and have been strengthened by observation and experience. It is probable that this doctrine, at times, may have been carried too far, and that courts of justice, in their zeal to suppress the mischief, have, in some cases, exceeded their proper bounds. It is also possible that contracts exist, of a doubtful character, to which the rule would be applied with some difficulty, as in some of the cases put by the counsel; but a similar inconvenience may attend the application of any other legal principle to certain cases. This, however, would not afford a just ground to deny its existence, nor would it justify a refusal to apply it to cases clearly within its operation. It is unnecessary now to say, whether all or any of the cases put by counsel, for the purpose of illustrating the injustice of the rule, [52] would or would not be affected by it. Most probably some of them would not. It is our duty to decide the particular case in hand, and to leave others to be settled when they may be presented for adjudication. We can not, however, forbear to remark, that some of the cases put, and others of a similar cast, are said not to be law, and can not mislead. It is laid down, not to be

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maintenance for a man to give another friendly advice, or to render him acts of neighborly kindness, in relation to his lawsuits, and that to be blameworthy, he must be guilty of a *contentious, over-busy intermeddling*.

Whatever may be the effect of the sale and transfer of real estate, not in the possession of the vendor, it is admitted that our laws allow the sale of choses in action, and equity will aid in protecting and securing the right of the purchaser; but the analogy between these cases and the one under consideration is too remote to be readily perceived. It is also admitted, that as there is no law prohibiting the sale of a chose in action, so neither is there any regulating the consideration, or the mode of paying it, which is left to the will of the parties. It may be payable in money, property, or personal services, but notwithstanding this admission, we affirm that modes of payment might be stipulated that would be illegal, and that could not be enforced in a court of justice. Instances of this kind will readily occur to every person of reflection. This fact proves, that notwithstanding it is a general rule that men may stipulate for such consideration as they choose, yet the rule has its exceptions, and the case now before us may safely be considered as one of them.

Whatever may have been the merits of the claim set up by Vattier—whatever power he might have had to sell that claim—and although he had an unquestionable right to purchase the professional services of the plaintiff in the prosecution of that claim—yet we can not see the absurdity of saying, that the claim could not be stipulated as the consideration of the service, or the service as the consideration of the claim. To admit this as an absurdity, would be to destroy all distinctions, and to admit that the legality of a transaction is in no case to be affected by a reference to its consequences. The sale of a claim may be perfectly innocent—the purchase of professional services may be unexceptionable, and yet the purchase of those services, by the transfer of the claim, in the prosecution of which they are to be employed, may be highly pernicious, and attended with such injurious effects on society, as to render it expedient to prohibit such a contract. Experience teaches \*that such consequences usually attend such con- [153] tracts. Hence the propriety of the restriction in question, while you permit the sale of the claim, or the purchase of the services, as distinct transactions.

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We do not admit the conclusions of counsel, that the consequences which these contracts may have on society can not enter into the argument—that they are only to be urged before the legislature, and can not be listened to or regarded by the court. This proposition at once begs the question, by supposing that there is no rule of law on the subject. Were this the case, we admit that the legislature alone could remedy the evil, as the court has no power to introduce a new law, but when a rule of law does exist, applicable to the case, and sufficiently broad to embrace it, it is the province of the court to apply it. They are the tribunal to whom the appeal is to be made, and by whom it must be decided. The legislature may say what the law shall be—the court must say what it is.

But we are told, that to declare this contract not to be void on the face of it, does not include the consequence that all agreements of this nature are to be held obligatory. The proposition is admitted, and although counsel might wish to limit the exception to such contracts as come within the scope of the twelfth section above referred to, yet the court believe it to be much more extensive, and to embrace this case, whatever may have been its actual effect on the parties claiming the property in contest.

Judgment, therefore, must be entered for the defendant on the demurrer, which we consider clearly supported.

The stipulation in the contract, on which the opinion and judgment of the court are chiefly predicated, and to which they have directed it to be confined, is that which prevents Vattier from compromising and settling the matters in controversy, without the concurrence and consent of the other contracting parties. This point being considered sufficient, the court forbear to give an opinion on any other. As the provision, on the subject of cost, is not set out in the declaration, and the defendant has demurred without oyer, that feature in the contract has not been considered.

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Norton v. Hart.

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\*NORTON v. HART.

[154]

Plaintiff, in action for trespass on real property, where the damages laid exceed one hundred dollars, entitled to costs, without regard to the amount recovered.

ACTION of trespass with force and arms, for breaking and entering plaintiff's close, digging up stone, laying on timber, etc., commenced in the common pleas of Portage county. Damages laid, four hundred dollars. Verdict and judgment in the common pleas, and an appeal to the Supreme Court. Verdict in the Supreme Court for the plaintiff—damages twenty-five cents. The plaintiff claimed judgment for the damages and costs. At the suggestion of the defendant's counsel, the question was reserved to be decided here.

J. SLOAN, for the defendant, cited and relied upon the thirtieth and fifty-second sections of the act regulating the duties of justices of the peace, contending that these two sections, read and interpreted in connection, precluded the plaintiff from recovering costs.

By the COURT:

By the fifty-second section of the act defining the duties of justices of the peace and constables, in criminal and civil cases, passed February 16, 1820, it is provided, "That if any person or persons shall commence or prosecute any suit for any debt or demand, by this act made cognizable before any justice of the peace, in any other court than is authorized and directed by this act, and shall obtain a verdict therein for debt or damages, which, without costs, shall not amount to one hundred dollars or more, he, she, or they, so prosecuting, shall not recover any costs in such suits, any law to the contrary notwithstanding."

In order to a correct decision of the question reserved, it is only necessary to ascertain whether, in the case before the court, a justice of the peace could have held jurisdiction.

By the fifth section of the before-recited statute, the jurisdiction of justices of the peace is extended, under the restrictions and limitations provided in the same act, to any sum not exceeding one hun-



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dred dollars. In the forty-ninth section it is provided, in effect, "that this jurisdiction shall not extend to actions of trespass with force and arms, for assault and battery, for malicious prosecution," etc., nor to actions "where the title of lands is called in question." These provisions were contained in the justices' law previous to the year 1816, and in construing the several statutes on the subject, it 155] \*was held that a justice of the peace had no jurisdiction in actions of trespass upon real property. To remedy this evil, the legislature, on the 17th February, 1816, passed an act extending the jurisdiction of justices of the peace to actions of the latter description, where the damages demanded should not exceed the sum made cognizable before a justice, or, in other words, where the damages demanded should not exceed one hundred dollars.

This provision is retained in the law of 16th February, 1820, first recited; by the thirtieth section of which it is enacted, "That the jurisdiction of justices of the peace shall extend to actions of trespass on real estate, in cases where the damages demanded for such trespass shall not exceed the sum made cognizable by a justice of the peace in other cases." By the terms of this section it would seem that the sum *demanded* is the test by which the jurisdiction is to be ascertained. If the plaintiff demanded damages to a greater amount than one hundred dollars, the justice has no jurisdiction. The plaintiff may be mistaken with respect to the actual damage he has sustained. There is no certain rule by which this damage can be ascertained. If a suit be commenced upon a note or bond, the instrument itself will afford some certain rule by which we can ascertain the extent of injury sustained by the plaintiff. In trespass upon real property or upon the person, it is different. See *Wilson v. Daniel*, 3 Dallas, 401; *Hancock v. Barten*, 1 Serg. & R. 269.

In the case before the court, the damages demanded were four hundred dollars. This exceeded the jurisdiction of a justice of the peace. The suit was well commenced in the court of common pleas, and the plaintiff is entitled to costs. If the intention of the legislature were different—if they intended that in actions of trespass on real property, commenced in the court of common pleas, no costs should be taxed unless the plaintiff recovered one hundred dollars or more, they have not expressed that intention, and it remains for that body, and not for the courts, to apply the remedy.

## \*S. G. MARTIN'S CASE.

[156]

Costs of proceedings under occupying claimant law recovered by the party who prevails in the application.

GEORGE P. COTTON prosecuted ejectments against Samuel G. Martin, which were finally tried in the supreme court of Clinton county. Martin set up title in himself, but Cotton recovered. Application was then made by Martin for the appointment of commissioners to value his improvements, under the provisions of the law for the relief of occupying claimants of land. This application was sustained. The commissioners reported in his favor, and the proper orders were made for securing to him the advantages allowed by law. A question arose who should be held chargeable with the cost that accrued upon the application for, and proceedings of the commissioners, and the decision of this question was reserved and referred to this court.

DUNLEVY, for Martin, cited 1 Bibb, 116, as evidence that, in proceeding under a similar statute in Kentucky, the costs of the commissioners and their proceedings were charged against the party who was unsuccessful. In support of the reasonableness of this course he urged, that if the costs of such application were to be considered part of the costs of the suit, and charged, as matter of course upon the defendant, against whom a verdict must pass as the foundation of his application, the opposite party would be tempted to multiply costs vexatiously, as they could not fall upon him.

By the COURT:

As the commissioners may be appointed upon the application of either party, it must be considered as a separate proceeding, in which the party prevailing is entitled to his costs. In this case the application having been made by the defendant, in whose favor judgment has been rendered upon it, the court are of opinion that the costs must follow that judgment, and that an order be entered on George T. Cotton, lessor of the plaintiff, to pay the costs in question.

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Reedy v. Burgert.

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\*REEDY v. BURGERT.

Judgment upon a *scire facias* on a mortgage extinguishes a bond, note, or other evidence of the same original debt.

COVENANT was brought upon a writing under seal for the payment of money. The declaration was in the usual form. The defendant pleaded in bar that the note was given for a sum of money, the payment of which was secured by a mortgage upon lands, and that the plaintiff had prosecuted a *scire facias* upon the mortgage, under the statute, and obtained a judgment thereon. To this plea the plaintiff demurred. The case was certified from the supreme court of Stark county, to be decided upon the point presented by the demurrer.

LATHROP, in support of the demurrer, contended that the judgment on the mortgage could not bar the plaintiff's right to recover on the note.

It will not probably be contended that a judgment on the note would prevent a recovery on the mortgage, unless the note or judgment had been previously paid, or otherwise satisfied; for the statute, by saying that payment or satisfaction may be pleaded, contemplates a judgment, unless the whole of the mortgage money is actually paid when suit is brought.

Besides, the statute "*providing for the recovery of money secured by mortgage,*" is only an accumulative remedy to the equitable one on the mortgage, and the common law one on the note, that existed at the time of the passing of this statute; for the statute only declares that "it shall be lawful" to proceed by *scire facias* and obtain a judgment, so that the mortgaged premises, that may have *alone* secured a part or all of the mortgaged money a great length of time, may be sold.

Should the principle be established that an action can not be maintained on the note, because a judgment has been rendered on the mortgage, predicated thereon, the consequences would be extremely injurious to community, and this species of real se-

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curity, the benefits of which the legislature intended to extend rather than curtail, would be, in a great measure, lost. A creditor had often better take no mortgage when he has the offer of one, for under our appraisement law a sale on execution would frequently be delayed, and if the mortgaged premises were not sufficient to satisfy the debt, for the deficiency an action by *scire facias*, given by the statute, must \*be brought before an ex- [158] ecution can issue for such deficiency. Special bail, at all events, can not be required until after the return term and on application to the court, as a judgment is no contract on which a party may file his affidavit of the amount due. 3 Bur. 1548.

Again, a note, and a mortgage securing its payment, are distinct instruments, and a recovery may be had on each, independently of the other, for the mortgagor must show the mortgage money is paid, and not the mortgagee that it is not.

These contracts, too, being deliberately entered into for the benefit of the mortgagee, are laws between the parties, and the remedies thereon can not be presumed to be altered by a statute made in aid, not in derogation of the common law. 1 Cranch, 430, 460; 10 Johns. 579.

It is no valid objection to a recovery, in this case, that there will be two judgments for the same money, as the judgment on the mortgage in the first instance is virtually *in rem*, "that the mortgaged premises be sold," and if the whole debt is not satisfied by the sale of the mortgaged premises, which is often the fact, and the mortgagee have his judgment on the note, there will be no necessity of proceeding by *scire facias* on the mortgage judgment for the residue, without any increase of costs.

Should it be decided that the present suit can not be maintained, suits may be brought in chancery on the mortgage, with a great increase of cost to defendants, and substantially the same proceedings might be had as by *scire facias* under the statute, without in the least jeopardizing a recovery on the note, or instruments on which the mortgage is founded.

These double securities for money, and double remedies, are consonant with sound policy, beneficial to commerce, and of long established usage. The objection on this score, of the multiplication of suits, would apply with much more force to the bringing of several suits against the maker, obliger, and indorsers of notes,

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and which, for the securing of money, and the facility of collecting it, has been authorized by the legislature.

By the Court:

The counsel for the plaintiff seems to suppose that the action of assumpsit, debt or covenant; the action of ejectment to take possession of the mortgaged premises; and the bill in chancery to foreclose the equity of redemption, were all concurrent remedies [159] at the common law; and because more than one of these remedies might be pursued at the same time that the statute remedy, by *scire facias*, may be pursued with them. But this is a mistake. The action of assumpsit debt, or covenant, is resorted to for the recovery of the money due on the obligation. The action of ejectment is not a *concurrent*, but an auxiliary remedy; and the bill in chancery is of the same character. The ejectment is used to get possession of the landed security; the bill in chancery, to remove incumbrances from it.

The object of giving the *scire facias* was to enable the mortgagee to resort at once, in one action, to the recovery of his debt, and the subjecting his landed security to the satisfaction of it. This proceeding enables the mortgagee to obtain judgment for his debt and execution against the mortgaged premises, at the same time, upon which execution the premises are sold, discharged of the equity of redemption, which, without such proceeding, could not be levied upon and sold upon execution on a judgment of law. This was creating, by statute, a new and more summary remedy, to which the party might resort, without affecting his right to pursue the pre-existing remedies. It gave a choice of remedies, but did not confer a right to pursue them all at the same time.

By the first section of the *scire facias* law, it is provided that "it shall be lawful for the defendant to come in and plead payment or satisfaction for all or any part of the money demanded by the plaintiff, or *any other legal plea* in bar or avoidance of the deed or money therein demanded, as the case may require; and thereon the parties shall proceed to issue and trial as in other cases."

When judgment is rendered, the second section directs that execution shall issue, upon which the mortgaged premises shall be taken and sold as other lands. The third section provides that if

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the mortgaged premises shall not sell for the sum sufficient to satisfy the judgment, "then the residue of said judgment so remaining unsatisfied, shall be deemed and taken to be a debt of record," upon which the plaintiff may sue out a *scire facias*, and proceed to judgment and execution thereon, as in other cases.

These provisions show that it was the intention of the legislature that the *scire facias* should be prosecuted, defended, and tried, upon the whole merits of the plaintiff's claim, and that the judgment rendered should be final and conclusive between the parties. That judgment ascertains the true amount of the debt due, and constitutes it a debt of record, in virtue of the express terms of the statute. It results necessarily from this conclusion, that a bond or note, or other \*evidence of debt, being the founda- [160] tion upon which this judgment is predicated, must be merged in the judgment; and no other action can be sustained for the debt unless founded upon the record.

Some absurdity, and much inconvenience and injustice, might be the consequence of a different doctrine. If the plaintiff should be dissatisfied with the amount recovered on the *scire facias*, he might resort to his action for the original debt. All the facts investigated and determined on the trial of the *scire facias*, would be open for second investigation. A recovery might be had for a different amount; two different verdicts and judgments might exist at the same time, for the same debt, and another suit would become necessary to prevent a double satisfaction.

It is objected that if this action can not be sustained, it deprives the plaintiff of the advantage of requiring special bail. The answer is, that the statutory remedy by *scire facias* proceeds against the land, a security which the plaintiff himself agreed to accept. An additional security upon the debtor's person ought not therefore to be required—and the plaintiff elected to take this remedy as it is given. Had he wished to add a claim upon the defendant's person in addition, he should have elected to take his common law remedy, and brought his action for the debt.

In respect to the two judgments for the same debt, this case is alleged to stand upon the same footing of separate judgments against the maker and indorsers of a promissory note. But the resemblance does not hold. In that case the judgments are against

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different persons, upon separate and different contracts. Here, if two judgments could be had, they would be against the same person, upon the same contract.

A majority of the court are of opinion that the defendant have judgment.

Judge SHERMAN dissented.

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\*KERR AND OTHERS v. MACK.

Entry of land vague and uncertain at the time when made, can not be sustained because its calls obtain subsequent notoriety.

THIS case came before the court upon a bill of review, and was reserved for decision here, in Adams county. The material facts were as follows:

Robert Mack prosecuted his bill in equity against Kerr and others, to obtain from them the legal title to three hundred acres of land, alleged to be covered by his elder entry, No. 4,834, but for which the defendants had obtained a patent upon a junior entry. Mack's entry was made February 3, 1806, and in these words:

Robert Mack enters 750 acres of land on the waters of Eagle and Brush creeks, beginning at the northwest corner of Thomas Blackwell's survey, No. 2,060, running south 23 west, with Blackwell's line, to his southwest corner, thence with another of his lines south 67, east 110 poles, thence south to the line of Charles Morgan's survey, thence with Morgan's line west to his northwest corner, thence south 200 poles, thence north 67 west, and from the beginning north 67 west, so far that a line south 23 west will include the quantity. This entry was surveyed February 5, and recorded February 25, 1807.

Thomas Blackwell's survey, 2,060, called for in Mack's entry, calls to lie on the waters of the west fork of Brush creek, to begin at an elm and two ashes, southwest corner to his former survey, No. 1,043, and southeast corner to his other survey, No. 2,059. Was made April 2, 1792; recorded May 10, 1792.

There is no evidence that Blackwell's survey, 1,043, called for in the above survey, ever existed. His survey No. 2,059 calls to lie

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on the waters of the west fork of Brush creek, beginning at a mulberry and two sugar trees, northwest corner to his survey No. 1,043, southwest to Robert Morrow, No. 1,306, and southeast to Abraham Buford, No. 398, running with Buford's line. Executed March 30, and recorded May 9, 1792.

There is no proof that the surveys of Morrow or Buford, called for in this entry, ever existed.

The entry under which the defendants claimed, was made 23d day of March, 1806, and called to lie on the waters of Brush and Eagle creeks, beginning at an ash and two elms, westerly corner to Thomas Blackwell's survey No. 2,060, running with his line and \*course thereof, north 23 east 385 poles, thence west 200 [162 poles, thence south 400 poles, thence east and from the beginning south 67 east, for quantity. This entry was surveyed and carried into grant before that of the complainant.

The bill charged that the defendant, Kerr, who made the entry and survey, had full notice of Mack's entry when the latter entry was made. Kerr, in his answer, admits that before making the entry, he saw Mack's entry on the books of Anderson, but alleges that the calls were so vague and uncertain that he did not know where it was intended to lie, and insists that it was void for uncertainty.

The Supreme Court, consisting of Judges McLean and decreed in favor of Mack, to reverse which decree this bill of review is prosecuted.

Brush and Scott presented arguments for the complainants in the bill of review. No arguments are furnished on the other side.

They maintained that Mack's right to a decree depended upon the validity of his own entry—that this called for Blackwell's and Morgan's surveys, and unless these were notorious at the time Mack's entry was made, it wanted notoriety. It was not enough that the surveys called for could *now* be identified. Notoriety acquired after the entry was made, could not sustain it. An entry bound upon other entries or surveys, is not valid, because those surveys have been made and recorded. It is not the record of a survey, but the notoriety on the ground, that is necessary. They cited Hardin, 73, 89, 103, 116, 287; 1 Bibb, 7, 35, 61, 81, 86, 139; 2 Bibb, 106.

They maintained that Blackwell's survey, 2,060, carried on its



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face no character of notoriety; that it could only be found by reference to Blackwell's other two entries, which it called for; that one of these, No. 1,043, did not exist; that the other, 2,059, was based also upon the survey 1,043, and two other surveys which were not known to have been made or to exist. Mack's entry, therefore, was destitute of both direct and relative notoriety.

They contended that the fact of notice could not vary the case; that the entry must be good when made. It could derive no validity from the fact that the person claiming knew where it was intended to appropriate the land. It could not be good against one person and vicious against another. It must be valid against everybody, or none. It appropriated the land against all the world so soon as the entry was made, or it never appropriated it.

163] \*Opinion of the court, by Judge BURNET:

The evidence does not show that the surveys of Blackwell and Morgan had acquired notoriety at the time Mack's entry was made. It is admitted by Kerr that he had seen the entry of Mack on the books of the surveyor before he made the entry No. 4,962, but, from its vague and uncertain calls, he did not know where it was intended to lie. On this fact, the complainant Mack chiefly relied as sufficient to support his claim. The question, therefore, presented for decision is, whether an entry, vague and uncertain at the time of its inception, can be supported by evidence that its calls had acquired notoriety, or had become known to a subsequent locator, prior to the date of his conflicting entry.

The great difficulty in settling titles within the Virginia military district arises from the expressions in the statute which directs the mode of making locations. They must be made so specially and precisely that others may locate the adjoining residuum with certainty. The indefinite import of these expressions has opened a wide door for judicial construction, and has led to the establishment of a variety of rules, which approach very near to legislation, but which seems to have been necessary to sustain a large portion of the early entries. These rules have been gradually introduced and so modified from time to time as to produce the least inconvenience with the greatest degree of justice to contending parties, and to place the titles of real property, ac-

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quired under the laws of Virginia, on as secure ground as the loose mode of appropriation would well admit.

An entry, to be special and precise, should be made in such words as will point it out to third persons, and distinguish it with clearness from all others. If such language be not used, a subsequent locator can not take the residuum with certainty; but what words or descriptions will be sufficient for the purpose, must be decided by the court, and should be determined by general rules, established for the government of all cases to which they can apply. These rules should not be lightly disturbed or deviated from, because they may appear to operate severely in particular cases. It is better to have an imperfect rule than to be without any. If a rule be often departed from, it ceases to be such, and each case is left to be decided by the impression which some imaginary distinction or peculiar circumstance of apparent hardship may make on the mind of the judge. Such a course would be arbitrary—it would expose litigants to the effect of partiality and prejudice, which may, unperceived, influence the mind of [164 the most upright; and it might induce the unsuccessful claimant to ascribe his loss rather to the feelings of the court than the decision of the law. It is important, in the administration of justice, that the unfortunate party should go out of court with an impression that his case has been determined agreeably to known and established principles, although he may believe they have operated unjustly in his particular case. The cause we are now determining is one which pleads as strongly for a relaxation of the rule as any other we can well imagine. There is an apparent want of equity on the side of the complainant, calculated to induce a prejudice against his title. At first view, it would seem to be unjust and inconsistent with our earliest impressions of right and wrong, to permit a person with a knowledge of a prior entry, intended to appropriate a tract of land, to locate the same tract, and to dispossess the occupant, because his location was not made so specially and precisely as to afford notice at the time it was made. But when we consider that the first location was not made agreeably to law, in consequence of which the locator acquired no legal right, and reflect on the importance of adhering rigidly to the forms prescribed for the acquisition of property, and the uncertainty that would result from a contrary course, the propriety of conforming to the rule becomes apparent. The courts of Ken-

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tucky, which are more conversant with the land laws of Virginia, and have a deeper interest in the correct exposition and application of their principles than any other tribunals in the country, have, by a course of decisions, settled the principle that notoriety must be co-existent with the entry, and that no after acquired notoriety can aid it. In *McClanahan v. Berry*, Hugh. 177, the court say that the place called for in the locations of the appellee, had not that notoriety *when the locations were made*, which the land law and the reason of the case required, and as none of the other calls were precise and unequivocal, he had not made out a legal or equitable right to recover. In *Key v. Matson*, Hard. 73, this principle was departed from. It is there said, that an entry can not be supported, unless it call for some object which was notorious, or *became notorious before the conflicting entry was made*. But in the case of *Smith v. Smith*, Hard. 191, the doctrine of *McClanahan v. Berry* was assumed, and the principle recognized in *Key v. Matson* was overruled. The complainant failed because it was not shown that the objects called for had acquired any notoriety *previous to the date of his entry*.

The same doctrine is supported in *Craig v. Baker*, Hard. 287, 165] and \*it is worthy of remark that this case is referred to by the reporter, in a note to *Key v. Matson*, as deciding that the objects called for must be notorious at the date of the entry calling for them, and consequently as overruling the authority of that case.

*Couchman v. Thomas*, Hard. 270, goes on the same principle. The complainant's entry was made in 1782—the calls were not calculated, *at that time*, to apprise the holder of another warrant that the land in controversy was appropriated. The objects described had not notoriety by themselves, or in conjunction with any of the other calls in the entries, *at the date thereof*. *Speed v. Lewis*, Hard. 476, is also in point. There being no proof, in that case, that the objects called for in Speed's entry, were generally known *at the time it was made*, the conclusion, said the court, must be that his entry can not be sustained.

Judge Bibb, in the introduction to the first volume of his reports, page 20, says that notoriety must be co-extensive with the entry. As the cases above cited had been decided, and reported before the introduction was written, the judge might with safety have relied on their authority for the support of his position, but he has gone

into a course of reasoning on the point, which seems to sustain him independent of the authority of adjudged cases.

In *Mosby v. Carland*, 1 Bibb, 86, the court were of opinion that an entry should be taken as it would have been understood, *on the day it was made*.

In *Galloway v. Neal*, 1 Bibb, 140, the question turned on the notoriety of a survey, called for in an entry. The record exhibited no evidence of the notoriety of that survey, *at, or before the entry*. The certificate of survey contained no description which could be reasonably calculated on, to inform other holders of warrants where it was situate. The court decided in that case, that if the holder of a warrant adopts a survey, made on another warrant, as the basis of a location, he must prove the notoriety of the survey *at that period*, otherwise his location can not be supported; and because the complainant had not made out that the survey in question had been generally known to those conversant in that neighborhood, *at the date of his entry*, his location was not supported.

In *Woolley v. Bruce*, 2 Bibb, 106, it was decided that "the complainant's entry must rest on its sufficiency, *at the time it was made*, and the *then* notoriety of the objects called for. If they were *then* insufficient to enable a subsequent locator, by using reasonable diligence, to find them, it must be taken to be insufficient. *No after \*acquired notoriety can aid it*. It must possess the [166 intrinsic qualities of good entry at the time it is made, and not rely on mere contingencies, that may or may not happen."

In *Bowman v. Melton*, 2 Bibb, 155, the notoriety of the object called for, was required to exist *before the date of the entry* in question. The same principle is supposed in *Carson v. Harway*, 3 Bibb, 160; *Devour v. Johnston*, Ib. 411; *Hanley v. Hardin*, 4 Bibb, 576; *Woolfscale v. Meriweather*, Ib. 138; *Galloway v. Webb*, 1 Marsh. 129; *Howard v. Todd*, Ib. 277; *Haws v. Marshal*, 2 Marsh. 415.

In *Craig v. Pelham*, Pr. Dec. 287, it was decided that although the subsequent locator had *notice in fact*, of the land intended to be secured, it was insufficient, and that if the entry was not special in itself, the proprietor could not hold under it.

In *Wilson v. Mason*, 1 Cran. 100, complete notice had been obtained of the elder claim before the subsequent entry was made, but the court decided that titles must rest on general principles. Therefore the junior entry of Wilson, who was charged with actual

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notice, was sustained, against the prior survey of Mason, because the survey was not supported by a legal entry.

This doctrine is reasonable, as well as conformable to the statute; for although the certainty required, is designed principally for the convenience and safety of subsequent locators, yet it is required absolutely, and can not be dispensed with.

The validity of an entry should not depend on the fact whether a subsequent locator has been misled, or whether he is liable to be misled, it ought, therefore, to be so special, precise, and certain, that a stranger may proceed immediately to locate the adjoining residuum without the danger of interference. The statute which gives the right to appropriate land points out the mode in which it shall be done, and it is necessary to pursue that mode, in order to make a valid appropriation. The properties of a valid entry are designated, and the court are not at liberty to disregard them. An entry must be special, precise, and certain. If either of these requisites can be dispensed with, they may all be disregarded, and every locator be at liberty to make his entry, as convenience or caprice may dictate; but the law certainly intended to guard against the confusion and uncertainty that would result from such a course. If an entry does not contain such calls as will enable a diligent inquirer to locate it, it is void, because not made in conformity with the statute.

There seems to be an inconsistency in saying that an entry, 167] which \*is evidently void when made, shall become valid by the lapse of time. This would be to test the validity of a title, by matter extrinsic, when the statute requires such matter to be contained in the record of the entry. It would also very much increase the danger resulting from the use of parol testimony. The courts of Kentucky have given a very liberal construction to the land laws of Virginia, and have gone as far to support vague and doubtful entries, as was in any degree consistent with the intention of the legislature or the safety of the parties interested. The door to the admission of parol evidence is already open to a very dangerous extent. To open it wider would be increasing the danger of supporting vague locations, to the prejudice of the careful and vigilant locator. An unprincipled or mistaken witness may be brought to testify that an entry, void for want of notoriety at its date, had acquired general notoriety, or had become known to a subsequent locator, prior to his entry. In such case the court

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would be required not only to set aside the junior entry made in conformity to the statute, but to support the prior entry, although null and void in itself; or, in other words, it would decide that an entry, void at its creation, may be rendered valid by the accidental circumstance that a subsequent valid entry has been made on the same land.

The commonwealth of Virginia, in their cession to the general government, reserved so much of the land between the Scioto and the Little Miami rivers as should be necessary for the satisfaction of a particular description of warrants. Congress accepted the cession of the entire territory subject to that reservation, and as Virginia retained the right to prescribe, and has prescribed by statute, the manner in which the lands shall be entered and appropriated, the general government, to whom the title was conveyed in trust, can not be required to convey to a person who has not entitled himself to a conveyance by a compliance with the statute.

A defective entry, being an attempt to appropriate the land contrary to the statute, can not authorize the locator to demand a title, nor justify the government in granting one. The confirmation, therefore, of a junior valid entry can not be considered as an act injurious to the claimant of a defective senior entry, because the latter, independent of the rights of the former, could not be entitled to a patent, nor could the government grant it without a breach of trust. In other words, an attempt to appropriate any part of this land contrary to law creates no right, nor can it prevent a subsequent locator from making a legal appropriation of the same land. \*Until a legal entry be made, the land must be [168 considered as unincumbered, and although a defective entry may have been made, it must be as liable to be taken by a subsequent legal entry, as if such defective entry had not been made, or had been made on a description of warrant not recognized in the act of cession.

In *Wilson v. Mason*, the Supreme Court say that "the legislature of Virginia, when bringing her lands into market, had *undoubtedly* a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers, for the purpose of particularizing the general title acquired by obtaining a land warrant, and that the court was by no means satisfied of its power to substitute any equivalent act for that required by the law." The State of Virginia, with equal certainty, had a right to prescribe the terms

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and dictate the mode of locating her military warrants, which are evidences of purchase. Such a measure was necessary for the safety and convenience of those concerned, as well as to insure an equitable distribution of the good lands. But it is enough to say that the legislature had a right to prescribe, and that she did prescribe the mode in which all entries should be made, and that no other power can dispense with it or substitute an equivalent.

It will be noted that the mode of entering and locating the warrants in question was declared by statute in 1779. The law for ceding the territory northwest of the river Ohio, did not pass till 1783, and when it did pass, it was on condition that Congress should hold the lands between the Scioto and Little Miami subject to the claim of the holders of Virginia military warrants, for which purpose it had been previously set apart.

It seems to follow, from these premises, that the holders of military warrants are vested with certain rights, which are ascertained by the statute, and should be regarded by the government, which is to be viewed in the light of a trustee. One of those rights is, that until the land be legally appropriated, any holder of a warrant may locate and secure it—consequently, a conveyance to a locator, who has not entitled himself to a patent by conforming to the statute, would be an abridgment of that right and a breach of trust. It is also contended that if an entry, defective in its origin for want of notoriety, become known to a subsequent locator before his entry is made, that circumstance ought to operate as notice in ordinary cases, and charge the second locator with the equity of the first claim. This, however, is only presenting the same question in a different form, and does not, in the least degree, free it

169] from the \*difficulty and inconsistency before noticed. The cases of *Wilson v. Mason* and *Craig v. Pelham*, before cited, maintain the contrary doctrine. In both cases it is decided that *actual notice* is not sufficient. In the former case, the Supreme Court of the United States say, "that land can not be lawfully appropriated without an entry—that notice of an illegal act can not make it valid—that a survey not founded on an entry (by which we understand a legal entry) is a void act, and constitutes no title whatever, and that consequently the land so surveyed remains vacant, and liable to be appropriated by any person holding a land warrant." It would be difficult to point out the difference between a survey made without an entry, as was *Mason's*, and a survey

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made on an illegal entry, as was the defendant's; because an illegal entry is as no entry. The land, therefore, in either case, must remain vacant, and liable to be appropriated.

The doctrine of notice, however, it is believed, has never been applied to cases under the land laws of Virginia, when the parties claim under distinct entries. In every such case, each claimant must rest on the validity of his own title, and if the elder entry be so defective as to be pronounced illegal, which must be the case if the junior is sustained, those defects will vitiate that entry independent of any influence arising from the junior entry. Each entry must stand or fall on its own merits, and the knowledge of the last location can neither aid nor injure the first location; if that be illegal, it is rendered so by its own defects, which can neither be increased nor diminished by anything connected with an adverse entry, or with him who holds it.

If a person in possession of land has purchased it for a valuable consideration from one having no right or title whatever, and a third person, with a knowledge of the facts, afterward purchases the same land from the real owner, his knowledge shall not affect him, because it can not aid the defective title of his adversary. In like manner, if a person contract for the purchase of real estate, by parol contrary to the form of the statute, and afterward another person, with full notice of such notice, makes a legal contract for the same land, his purchase shall not affect him, nor aid the first purchaser. For the same reason, the notice of Kerr can neither affect him nor aid the illegal title of his adversary. The doctrine of notice applies strictly to cases in which a person contracts for a title with notice of a prior legal contract for the same title, and not to persons who claim under different titles, one of which must necessarily be void, as is the fact in the case before us. Upon the whole, we are clearly of opinion that the decree is erroneous, and must be set aside.



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\*GARDENER v. WOODYEAR.

Bond for the prosecution of a writ of error good, where the condition is substantially that required by the statute, though its terms are not exactly followed.

THIS was an action of debt upon a bond. The declaration was in the usual form; the defendants cravedoyer and demurred. The condition of the bond is as follows: "Whereas, Thomas Woodyear hath this day obtained our writs of error and supersedeas to a judgment of the court of common pleas for Ross county, obtained by John Gardener, plaintiff, against the said Thomas Woodyear, defendant, April term, 1819. Now if the said Thomas Woodyear will prosecute our said writs to effect, and abide the judgment of the court thereupon had, then the above obligation to be void, otherwise to remain in full force and virtue."

The court of common pleas of Ross county gave judgment on the demurrer for the plaintiff, but assessed his damages to only fifteen dollars, a sum sufficient to pay the costs on the writ of error. The plaintiff appealed to the Supreme Court, and the question arising on the demurrer was reserved for decision here.

ATKINSON and LEONARD, in support of the demurrer:

The bond which the statute requires on a writ of error being allowed, must be conditioned for the payment of the condemnation money and costs in the common pleas, in case the judgment of the common pleas be affirmed in whole or in part.

The bond given in this case is conditioned that T. Woodyear shall prosecute the writs of error and supersedeas to effect, and abide by the judgment of the court *thereupon* had.

It is understood to be the opinion of this court, that a bond taken in pursuance of a statute, must conform to the provisions of the statute; and that any variance in the legal effect of it renders such bond null and void. This doctrine is expressly recognized in 3 Mass. 105; 1 Bibb, 214; 1 Pennington, 120, cited in American Digest, 70; 7 Cranch, 287. The reason and policy of this doctrine is very fully and ably gone into by the court in the case cited from Bibb.

The language of the condition here is obviously variant throughout from the language of the statute. 18 Rep. 410, sec. 95. But that this bond is also variant in its *legal import and legal effects*, as well as in its language, is evident from several considerations.

1. The statute makes the liability of the securities to depend upon the condition of *affirmance*, in whole or in part, of the judgment <sup>of</sup> the common pleas by the Supreme Court. Their [17] liability on this bond is made to depend on the condition of T. Woodyear's *prosecuting the writs of error and supersedeas to effect, and his abiding by the judgment of the court thereupon*. In the one case, the liability is conditioned or depends upon an *act of the court*; in the other, upon the *acts of T. Woodyear*. A forfeiture of the bond in the one case can only take place upon the *affirmance of the judgment below*; in the other, it may take place *before and without* such affirmance; as by an abatement of the suit in consequence of the death of the plaintiff in error, and no executor or administrator being appointed, or if appointed fails to prosecute; or by the writs being *quashed*. In either of these cases the liability of the securities would become fixed—fixed by the *non-performance* of an act upon which a forfeiture is not made at all to depend by the statute, and *by which very non-performance* the securities in a bond conditioned according to the statute would be *discharged* from all liability; because the event, to wit: the *affirmance* of the judgment below, in such case, could not or does not take place, and without such affirmance they could not be held.

But by this bond the forfeiture and liability of securities is also made to depend upon an act of T. Woodyear *posterior*, as well as upon an act *prior* to that contemplated by the statute, to wit: his *abiding* by the judgment of the court upon the writ of error.

2. Upon a forfeiture of a bond taken pursuant to the statute, the securities become bound to pay the amount of the *condemnation money and costs of the common pleas*. On this bond they are bound, if bound at all, to satisfy the judgment of the *Supreme Court*, and this liability may be *greater or less* than that contemplated by the statute, according as the judgment of the Supreme Court may be.

1. It may be *greater* in this, that the Supreme Court may reverse the judgment below, and then go on and render such a judgment as the common pleas should have rendered. Such a reversal would be a *discharge* of the securities in a bond taken agreeable to the statute; but in this case, by such a bond as this, the securities

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would be bound to satisfy the judgment of the Supreme Court on the reversal; for the letter and spirit of the condition of this bond would hold them to the judgment, and by no legal rules of construction could their liability be avoided. 2. The liability on a bond like this may be *less* than the statute intended; as in the present case, the judgment being only for the cost accruing on the writ of error. The judgment for the costs is all the judgment which T. Woodyear was bound to abide by, and all for which the securities [172] can be held, admitting the bond \*to be a valid one; there being no reversal and judgment for the debt, for that part of the entry or record relative to there being no error, and the affirmance of the judgment below is but the mere *opinion* of the court, giving no right of recovering anything from one to the other. This is evident: 1. Because the Supreme Court never render a judgment for anything more than the costs upon the writ of error, unless they *reverse* the judgment below, and here was no reversal. 2. Because the judgment below remained *valid and in force*, and was all the judgment necessary to enforce the collection of the debt on which it was rendered, and another judgment in the Supreme Court, for the same debt, between the same parties, would have been superfluous, and a thing unknown to the law. 3. Because the statute does not consider it in the light of a judgment. It considers an affirmance only as a matter of fact, or rather an event which may or may not take place. It makes it a condition simply, upon which the liability of the securities in a bond, taken agreeable to its provisions, is suspended. When it takes place, the extent of its operation is to *remove the bar* to the enforcement of the judgment below, and fix the liability of securities to pay that judgment. The statute recognizes its operation no further, and it is unnecessary that it should, for the object of its provisions is secured if the bond be properly taken. 4. It is nowhere defined to be a judgment, but, on the contrary, the idea of its being a judgment is expressly negatived in the books. 3 Blac. Com. 395, 396, and Jacob's Law Dic., Judgment.

3. If the legal import and effect of the condition of this bond is the same with one taken in strict pursuance of the statute, the plaintiff might have declared as upon the letter; that is, set forth the condition contemplated in the statute, averred the affirmance of the judgment below by the Supreme Court, and alleged for breach the non-payment of the condemnation money and costs in

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the common pleas; and have produced this bond to support his declaration. Upon oyer and demurrer to such a declaration, for variance between the condition of the bond set forth on oyer and the condition of the bond stated in the declaration, would this court hesitate for a moment to sustain such a demurrer? To decide otherwise would, it appears to me, be disregarding at once the plain import of language, the ordinary and established rules of construction, as well as the settled rules of pleading. It would be saying: "True it is the *language* is variant—the *act* or *event* upon which the liability of the securities depends, is variant—the time *when* a forfeiture may or must accrue or liability commence, is variant—and the *thing* to be performed \*on a forfeiture is [173 not the same; yet notwithstanding all these variances, the legal import and effect of the condition of the bond set out on oyer is the same, and different from the condition set forth in the plaintiff's declaration." It is impossible that the magic of any supposed *intention* in defendants to execute a bond agreeable to the statute, can harmonize such discordant language, terms, and consequences, or authorize this court to pronounce them to mean one and the same thing in law. Securities are held only by the most rigid rules of construction, and not otherwise.

4. The statute of 1808, 6 vol. 32, provided the same kind of bond to be given upon cases appealed, injunction, and writs of error. This statute was evidently defective in securing its objects, at least as to injunctions and writs of error. It was too *general* in its provisions to be considered *specific*, and too specific to be considered merely directory. This defect was remedied by the act of 1810, by providing *specifically* for each and every case *how* the bond shall be given. It fixes a condition absolute in each case; until that is complied with in the terms laid down no appeal is taken—no injunction can stay proceedings, and no writ of error can operate as a supersedeas. The deposit in the clerk's office of a bond different from that so specifically required by the statute affects nothing in either case, any more than a deposit of the amount of money intended by the statute to be secured would do. The plaintiff below should in this case have disregarded the bond, treated it as a nullity, and gone on and collected his judgment; and moved the court to dismiss the writ of error on the ground that it had been improvidently issued.

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BOND, for the plaintiff:

The question raised upon this demurrer is whether the bond must be held void because the condition is not in the terms required by the statute.

In determining this inquiry, it seems material to ascertain what the legislature intended by requiring a bond to be executed in such cases. It is manifest that inasmuch as the plaintiff was delayed in the enforcing of his judgment, and might thereby hazard his claim, the act was intended to guard against this danger in the event of an affirmation of the judgment. The defendant signed the bond under the expectation that they would be liable for the debt in this event.

Different words or language may convey the same idea, and have 174] \*the same effect, and it is wholly immaterial whether the language of the bond be "*in totidem verbis*" as used in the statute, provided the idea or effect be the same. The law regards substance and not form; *haret in litera et haret in cortice*. Suppose a statute require a sheriff to execute a bond conditioned "for the performance of his duty," and that the bond executed stipulate, "that he shall serve all process which comes to his hands, pay over all money by him collected, and, in fine, minutely detail every act which might be deemed part of his duty;" it is quite certain that such bond would be good, for the bond, though more in detail, comprehends no more than the statute required. This position was maintained by the supreme court in Ross county, at December term, 1821, in a suit on the bond of sheriff Steel.

The language of the condition in this case does not increase the liability of the parties beyond what it would be if the exact words of the law were used. Suppose the bond contained the language of the law, may it not be asked in such case if the parties would not be liable if the writ of error was not prosecuted to effect—if it was dismissed, abated, or in any way abandoned by the plaintiff in error. A contrary construction would entirely defeat the statute. Where, then, is the increased liability of the obligors? If it be contended that the language used would render the party liable, by the frequent continuance of the cause, or its inefficient prosecution, the answer is, that no matter how the truth of the case is, every continuance is in the eye of the law upon legal ground, for sufficient reason, and is presumed to have had the sanction of the court.

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As to the residue of the condition, "to abide the judgment of the court." To *abide* by the judgment, is to be *governed* by it. If the judgment is for the plaintiff in error, his covenant is performed; if *against* him, he certainly does not abide it unless he comply with it by paying the money; and by paying the money he discharges the covenant, for that is the utmost that the law requires, or the plaintiff could demand. The payment of the money is what the legislature intended to secure in requiring a bond to be executed.

The case found in 1 Bibb, 214, is one *sui generis*, and reasons of public policy, as disclosed in the opinion of the court, called for the decision. So, also, in the case found in 3 Mass. 105, a rigid construction seemed necessary. But it is worthy of remark, that in this same case in Massachusetts, it is decided that although the statute regulating prison bounds require the bond and security to be approved by two justices, still the bond is good without such approbation. \*And in Kentucky, 2 Bibb, 186, it is held that [175 although a statute fix the penalty of a sheriff's bond at one sum, yet a sheriff's bond executed for a greater penalty is good to the extent of the statutory penalty; and so if it be for less. 1 Bibb, 193, 479.

The rule is far from being a settled general rule, that a statutory bond, not pursuing the words of the statute, is therefore void. There are, it is true, cases of this kind, but they are founded on peculiar circumstances.

In Virginia (2 Hen. & Mun. 464), the supreme court of appeals examined this subject. A statute of that state required sheriffs who collected taxes to execute bonds to the treasurer. In the case referred to, the bond was given to the *commonwealth*, and sustained by the court. So also in a case before the general court of the same state (2 Call, 290), the bond for the forthcoming of property, which ought to have been executed to the *commonwealth*, was given to the sheriff, and yet sustained, and that judgment was affirmed by the court of appeals.

So far as the decisions of our own courts are known, they have sustained bonds though not in all respects pursuing the language of the law. Two cases are known in Fairfield, and one in Washington county, made by the present Supreme Court, and they will be recollected.

It may be added that all bonds in error which have been taken in Ross county since the passage of the present judiciary

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act, are like the one now sued on. These bonds are prepared by an officer of the court, in virtue of the statute, and on that account should not receive a rigid construction.

In 2 Hen. & M. 400, and 4 Mans. 383, two cases of bonds executed under a statute, and in which the surety's name was wholly omitted in the obligatory part of the bond, blank being left, the court sustained the bonds, and in the first of the cases Judge Tucker observes: "Where a party against whom an execution issues obtains an *indulgence* upon certain conditions, the court will not regard trifling errors, which are often the effect of haste, or inexperience in young deputy sheriffs with an eagle's eye, where the substantial justice of the case, or the positive and invariable rules of law, do not require them to do so." And in the same case Judge Flemming observes, "that if the meaning of the parties can be collected from the bond, it will be good."

The reasoning of these two judges is strictly applicable, and sustains the bond sued on in this case.

176] \*By the Court:

The bond in this case was taken under the ninety-fifth section of the judicial act, which directs that it shall be taken "in double the amount of the judgment obtained or decree rendered, conditioned for the payment of the condemnation money and costs, in case the judgment of the common pleas should be affirmed in whole or in part." This direction is not pursued in terms, the words used being, "that he will prosecute the said writs to effect, and abide the judgment of the court thereupon had." The defendants insist that the condition not being in conformity with the statute, the bond is inoperative, that it never was operative, and that the writ of error might have been quashed.

The principal point of the defendants' argument is, that the stipulation contained in the condition is different and more disadvantageous to them than that required by law. By the latter they are to pay the judgment and costs, *if the judgment be affirmed*. By the bond they forfeit the obligation, *if for any cause the party should fail to prosecute his writ to effect*.

The ninth section of the judiciary act of 1803, regulating appeals from the common pleas to the Supreme Court, directed that bond should be given "*for prosecuting his appeal to effect*." The seventh section of the act of 1805, on the same subject, contains the same

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provision; and the ninth section of the same act directs that, on writs of *certiorari* and *habeas corpus cum causa*, the condition of the bond shall be, "*that he will prosecute the same to effect, and abide the judgment of the court thereupon had.*"

The eleventh section of the judiciary act of 1806, in relation to writs of error, *certiorari*, etc., directs that bonds shall be taken, conditioned, "*that he will prosecute the same to effect, and abide the judgment of the court thereupon had.*" Section 13 of the act of 1808 makes the same provision.

In the revision of 1810, this phraseology was changed, and that introduced which is contained in the present laws. From 1803 to 1810, the courts uniformly decided that the undertaking to *prosecute the writ to effect, and abide the judgment of the court thereon had*, subjected the parties in the bond to the payment of the amount of the judgment and costs. The change of language in 1810 was adopted to express, in more explicit terms, the same thing which the courts had adjudged the other terms to express.

The bond in question contains precisely the very terms required by the earlier statutes in such cases, and which were interpreted by the courts to subject the obligors to the same liability imposed by the existing law, and to no other. This interpretation was [177 adopted from a clear conviction that such was the effect which the legislature intended the terms used should have. Because the legislature have now adopted more explicit terms, the court can not be warranted in deciding that the same terms, used for the same purpose, meant one thing in 1810, and another thing in 1820. It is, therefore, the opinion of the court, that the condition is, in substance, the same as if it had contained the express terms now required by the statute.

Upon an examination of the cases cited, as far as the authorities are within reach of the court, it is found that, taken altogether, the courts of other states have gone much further to support statutory bonds than it is necessary to go in this case. Where the bond has been held inoperative, the circumstances were materially different from those which arise here. There is no case where a bond, fairly and regularly executed, and comprising, substantially, all the requisites of the statute, has been adjudged void because it departed, in some one or more particulars, from the exact words used in the statute authorizing it to be taken. It has been the uniform object of our courts to support bonds executed under the provisions of



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law, where, by a reasonable interpretation, such bonds can be made to meet the intention for which they were required and taken. Where the party has had all the advantages of making the bond, the court can not aid him to avoid its obligations, by adopting strained and rigid maxims of construction.

Judgment must be given for the plaintiff.

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\*SMITH v. GODDARD.

Contract to pay two hundred dollars in current bank notes is a contract to pay in money, if bank notes be not tendered at the day.

AN action of assumpsit was brought in the common pleas of Greene county, upon a promissory note in the following words:

"I promise to pay Abbott Goddard, or order, at Xenia, two hundred dollars, in current bank notes, such as are passing in the common course of business, on or before the first day of June, 1822—value received this 25th March, 1820."

The defendant pleaded non assumpsit. Upon the trial the plaintiff gave the note in evidence to the jury; and the defendant then offered evidence to prove that at the time the note was given, the circulating medium of the country consisted of bank notes, passing at a discount of from twenty-five to thirty-three and a third per cent., and of a few bank notes passing at par with specie. That on the first of June, 1822, depreciated bank notes had ceased to circulate, and that no bank notes were in circulation but those which passed current at the amount called for, as specie. To this evidence the plaintiff objected, and it was rejected by the court of common pleas. The defendant excepted to this opinion, and a writ of error was allowed. The question was reserved by the supreme court in Greene county, for decision here.

B. COLLETT, for the plaintiff in error:

1. The language of the contract imports that other currency was intended than specie or bank notes passing as specie, for the sums of money apparently due on the face of the notes.

2. Parol evidence is admissible to show to the court the subject

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matter of a written contract, unless it be for the payment of lawful money, or the damages be assessed by express stipulation in the agreement.

3. Parol evidence is admissible to show and explain a latent ambiguity in the contract.

A contract is an agreement between two or more persons to do or not to do an act for a sufficient consideration. The word agreement, in the definition, imports that there must be a mutual understanding—a consent of the parties relative to the act to be done. If there should be a mistake—if the vendor intend to sell one article, and the vendee believe that he is purchasing another, a contract is not \*made, there being no mutual consent or agreement of the [179 parties, which constitutes the essence of the contract. To elicit the *intention* of the parties, the rules of evidence have been established.

The language of the contract imports that other currency was intended than specie or bank notes passing currently at par with specie. In the construction and interpretation of an agreement, courts will take cognizance, without the testimony of witnesses, of those facts of notoriety which compose a part of the public history of the country. This is a source of information on which the judges can rely with more certainty than on the statements of witnesses liable to mistake, to forgetfulness, and to be swerved from the truth by partiality. The fluctuations and changes of the circulating medium are the subjects of daily observation among the people in general. In this the value of their property is estimated—all buying and selling conducted. They are liable to be mistaken with respect to other public transactions in which they are not immediately interested, but on this subject their information is not only widely diffused, but accurate. We will advert to the history of the currency of this country, as to facts of which they will take cognizance independent of the testimony which was proposed. From the commencement of the settlements in Ohio, until the year 1815, the currency consisted of gold and silver coin authorized and made a tender in payment of debts by acts of Congress, and also of bank notes, redeemed on presentation in specie, and consequently passing currently for the sums of money expressed to be due by the notes.

In the ordinary course of business bank notes or coin, at the election of the debtor, were tendered and received by the creditor with-

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out distinction or hesitation. Notwithstanding bank notes were not a tender by act of Congress, such was the facility with which specie could be procured for bank notes and their equality in value, that both species of currency were contracted for by the expressions "the sum of — dollars," or lawful money of the United States. No distinction was made between them in the phraseology of agreements.

The parties to this contract, by the expressions, "to be paid in current bank notes such as are passing," could not have intended bank notes equal in value to specie, for they have departed from the ordinary expressions used in notes or obligations where specie or its equivalent, specie-paying bank notes, are intended. This inference is confirmed by a reference to the words of the agreement — "such as are passing in the ordinary course of business."

180] \*Another and a different criterion than that of the redemption of the paper in specie by the banks on presentation, or that the notes shall be equal in value to specie in the sum due by the terms of the contract, is made the rule by which the paper to be paid in discharge of the contract shall be tested. Men do not make a distinction in their expressions of contracting, unless there be a real and substantial, and not an imaginary difference. They do not establish one rule of testing the property to be delivered pursuant to a contract, when another was contemplated. It is not a necessary conclusion, that by the words current bank paper, gold and silver coin or its equivalent was intended. If we be correct in the exposition of this contract, that another description of paper either was or might have been intended than bank notes equal in value to the sums for which they were payable, parol evidence must be introduced to show to the court the value of the current bank paper to which the contract has reference.

This contract affords internal evidence that another description of bank paper was intended than specie-paying bank paper, when considered with regard to another part of the history of the currency of this state, equally public and notorious. The natural tendency of substituting a paper currency, unlimited in its quantity from the numerous banks chartered by the legislature, but necessarily limited in its circulation to the western country, was to banish the gold and silver coin from the country. Inasmuch as bank notes, for the purposes of internal trade, are equivalent to specie, the coin was immediately removed and employed in foreign trade. Our

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banks became unable to redeem, on presentation, their notes in specie. Their credit and value gradually decreased. The small quantity of specie remaining in the country was either confined in the vaults of the banks, or under lock and key in the chest of the miser. So difficult was it to procure specie, that Congress were compelled, from session to session, to extend the time of payment to their debtors in the land office. No alternative remained. The people were compelled to continue depreciated paper as the circulating medium, or barter one article of personal property for another. Depreciated bank paper continued, for a period of several years, the currency of the western country. It was received by the merchant for foreign merchandise, for labor by the mechanic, and by the farmer for the produce of the soil. In this currency was estimated the value of all property, real and personal.

As this description of property constituted the circulating medium of the country, when the parties to a contract adopted [181 the phrases, "a sum of money," "a sum in dollars and cents," without adding explanatory words, the presumption was that the parties intended the ordinary currency, depreciated bank paper. The word money, as well as dollars and cents, included in its definition, as understood by the people, depreciated bank paper, gold and silver coin, and a few bank notes passing as specie for the sums expressed to be due on their face. And because the relative proportions of depreciated bank paper to coin and to bank paper equivalent to specie was more than ten to one, courts of justice, in the interpretation of contracts, will adopt the popular meaning of the words rather than a technical or classical definition. It is beyond the power of the most absolute despot to compel the people by law to change the meaning of a word used in common conversation. Julius Cæsar, no less eminent as a scholar than as a statesman and warrior, who gave laws to Rome, complained that he could not either introduce a new word or change the meaning of a term in the language of the people. This is a right which the people will exercise, and which, it appears, they will not delegate in a republic or surrender to a monarch. Peake's Evidence, 112, note V.

In the 1 Tyler, 382, Vermont, a contract in writing for the payment of a sum in dollars and cents, parol evidence was admitted to prove that United States bank bills were intended, this going to explain, not to controvert, the contract. The court, in this case, interpreted the words "dollars and cents" according to

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the popular sense and meaning, rather than with a reference to the technical and scientific definition.

If doubts should exist relative to the construction of the word "money" or of the words "dollars and cents," no doubt or hesitation can exist whether by the words "such bank notes as are passing currently in the ordinary course of business," depreciated paper was intended. If the question had been asked, what was the meaning of the phrase "depreciated bank paper," the person to whom the question was proposed, could not have cited a more apposite case, or mentioned a more perspicuous example to illustrate his meaning, than by stating that it was such bank notes as were currently passing in the ordinary course of business in Ohio, during the year 1820.

If the plaintiff should object that the court can not recognize those public and notorious facts, and that parol evidence is inadmissible, I would inquire whether it is a truth self-evident or a 182] legal maxim, that current bank notes always have been and must continue to be equal in value to specie for the sums expressed to be due on the face of the bank notes, and that the people in general have received and must continue to receive them in payment of debts. Unless those are self-evident truths, it would seem necessary to exhibit testimony to inform the court of the value and description of those notes. Otherwise I can not conjecture how the court could assess with correctness the amount, in damages, of the injury which the plaintiff has sustained from the violation of the contract. A contract is made for the payment, at Cincinnati, of one hundred dollars in bank notes on the bank of the United States at Philadelphia, and the payor has violated his contract: what would be the criterion of damages? Would it not be a sum of money sufficient to purchase one hundred dollars in bank notes of that description? If they should be worth, in the market at Cincinnati, two per cent., one hundred and two dollars would be assessed. If the notes of that bank should not be in existence at the time when the payment should be made (if contrary to the expectations of the parties, the performance became impossible), the consideration or its value should be restored. The word "dollars," in each of those contracts, is not intended to express the value in coin of the bank notes to be paid in performance of the agreements. It is manifestly used for the purpose of describing the amount purporting to be due on the bank notes.

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2. Parol evidence is admissible to exhibit to the court the subject matter of the contract, unless the parties have stipulated for the payment of lawful money, or where, by the terms of the agreement, the sum of money to be paid in damages for the non-performance of the contract, is ascertained by express stipulation. Where the parties to an agreement have contracted for the payment of lawful money, and it is admitted in the record or appears from testimony that the money has not been paid, the court will render judgment without the intervention of testimony. The words of the contract ascertain the debt which is due, and the statute prescribes the rate of interest or damages to be paid for the delay of payment.

If the parties to a contract, by express stipulation, assess the sum in damages to be paid for the violation of the contract, evidence would be unnecessary to ascertain that fact which the parties have rendered certain by the terms of the contract.

But if the contract is to be performed by the delivery of other property than lawful money, and if the damages be not liquidated \*by the terms of the agreement, inasmuch as the value of [183 property in specie is uncertain and variable, parol testimony is necessarily required to inform the court of the injury which the obligee has sustained, to wit: the value of the property in money, which should have been delivered to him in compliance with the terms of the contract. It is obvious from reading the promissory note on which this suit has been brought, that the phrase "two hundred dollars in current bank notes," is descriptive of the aggregate amount purporting to be due on the notes, to be tendered in discharge of the agreement, and are not intended to designate the value, in specie, of those notes.

It can not be contended that the sum, in dollars, is mentioned for the purpose of ascertaining the amount, in damages, to be paid if the contract should not be performed.

The principle for which we contend is not a novelty in judicial proceedings. It has justice for its foundation, and has received the sanction of the courts of justice in England and in the United States—that the words of a contract shall be construed according to the sense in which they are understood by the people in the ordinary transaction of their business, and that if the performance of an agreement has become impossible by an event unexpected and beyond the control of the parties, this mutual mistake shall

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not operate to the injury of either party—the consideration or its value shall be restored.

The history of the currency which constituted the circulating medium of the United States during the war of independence, is well known to this court. It consisted of treasury notes; and from the large amount of notes which the necessities of the United States compelled them to issue, without possessing the means of redemption, they gradually depreciated in value until their circulation entirely ceased. The legislatures of the different states, to support the credit of those certificates, enacted laws declaring that they should be a lawful tender in payment of debts. When it was discovered that this description of paper could not be ultimately redeemed, the legislatures of the States of Virginia and Pennsylvania, by legislative acts, repealed the tender laws, and instructed their courts of justice, in the rendition of judgment on contracts made for the payment of lawful money during the time that continental certificates were current, to assess the value, in specie, of the treasury notes at the date of the contract, as the amount of their judgment. This rule was just and equitable. The contract 184] was for the payment of lawful money of the United States, of Virginia or Pennsylvania, at the time of entering into the contract. The value of property, the subject and consideration of the contract, was estimated in certificates. Had it been valued in gold and silver coin, the sum of money expressed in the contract would have been diminished by a deduction of four-fifths or six-sevenths of the sum mentioned. Would not the seller of the property expect to receive, and the purchaser to pay, depreciated certificates? Could it have been seriously contended that it was the understanding that the purchaser would pay the amount due on the contract in specie to the amount of the sum expressed in the agreement or certificates at his election. With as much plausibility might it be urged that a promissory note for the payment of one hundred dollars in the year 1820, was intended to be discharged by the payment of one dollar or of one hundred dollars, at the election of the payee. Those statutes are declaratory of the principles of justice and equity—that the property of one man shall not be transferred because an event has happened which the parties to a contract did not foresee and which was beyond their control. If an event has happened which leaves a *literal* performance of the contract possible, yet renders the exaction of the literal

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performance manifestly unjust and contrary to the intentions of the parties, courts of justice interpose and restrain the austere creditor from reaping where he has not sown, and have compelled him to accept of the value of the property with which he has parted. They have compelled him to accept of a substantial performance of his contract. The legislatures of the states are prohibited by their constitutions from the enactment of laws impairing the obligation of contracts. If they were not restrained by constitutional restrictions, no state would arrogate to itself the power of altering or rescinding contracts. Such statutes would be styled laws in favor of falsehood, fraud, and injustice. Would the United States, after resisting, during a long and arduous contest, tyrannical encroachments on the rights of the people—after the achievement of independence, as the first act of legislation, promulgate a law, the benefit of which would be enjoyed by no honest citizens—which offered a premium and reward to the violator of his solemn contracts. Those statutes have received the approbation of the Supreme Courts of Pennsylvania and Virginia, and were declared to be founded in justice, and consistent with good faith in the performance of contracts. 1 Wash. 36; 1 Call, 244; 1 Hen. & Mun. 331, 338; 2 Dallas, 173.

\*If the defendant had contracted for the payment of two [185 hundred dollars in current money, the cases cited would justify the court in the admission of the testimony proposed. The words "dollars and money," included in common parlance depreciated paper and specie. Current could with more propriety be predicated of the former than of the latter. Specie in circulation had become scarce, paper money abundant. In the latter, as the standard of the value of property, was buying and selling conducted. There were at least ten dollars in bank paper depreciated in circulation to one in specie.

The presumption, then, arises, that when the words "dollars," or "dollars current money of Ohio," are used in a note or obligation, without explanatory words, depreciated bank paper was intended. If the payee of the note or obligation of similar phraseology should contend that it was intended to be paid in specie or its equivalent, specie-paying bank-notes, the "*onus probandi*" would rest with the plaintiff. 1 Hen. & Mun. 331; 2 Dallas, 173.

Having established the correctness of the position, that parol



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testimony is requisite to explain this contract, the question arises, is the testimony proposed such as would be satisfactory to the court—such as manifests the intention of the parties, and will enable the court to assess equitably the damages sustained by the plaintiff.

On the 25th day of March, 1820, the defendant agreed to pay to the plaintiff "two hundred dollars in current bank notes, such as are passing in the common course of business, on or before the 1st of June, 1822." The expressions "*are passing*," show that they had reference to the currency at the date of the contract. This interpretation is confirmed by directing the attention of the court to the words "on or before." The defendant might have tendered notes passing currently, to wit: depreciated paper, at any time from the date of the execution of the note until the 1st of June, 1822. This proves to the court that the property—the consideration of the contract—must have been valued in depreciated currency. It is absurd to suppose that the owner would estimate the value of his property in specie, and agree that the purchaser might pay for it by tendering two-thirds or three-fourths of the value, or the full amount of the valuation, at his election. It is equally absurd to suppose that this contract was intended, and might have been discharged by the defendant, at his election, either in bank notes equal to specie for the sums expressed to be due on the notes, or in depreciated bank notes. Where the condition of a contract [186] is in the alternative, \*some equality is observed in the value of those acts submitted to the choice of the obligor.

"Interpretation ought to be in favor of him who is obliged by the covenant; for he that is obliged, it may be presumed, designed to perform the least, and it was the other's fault that he did not express himself in better terms." Cooper's Justinian, 588, J.

It can not be seriously argued that the contract was in the alternative—that the defendant might either tender specie-paying bank paper or depreciated bank notes, at his election. The latter description of paper possesses every quality required by the expressions of the contract, in a more eminent degree than the former. It was more abundant and common. In it was property valued. If, however, this construction should be doubtful, the above rule of interpretation, founded in good sense and experience,

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would give to the contract the meaning contended for by the defendant.

"The beginning and consideration of every contract are to be considered." Cooper's Justinian, 587, C.

The presumption is that the value of the consideration was estimated in depreciated bank notes. At its commencement, and at any time previous to the time when depreciated bank notes ceased to pass currently in the ordinary course of business, this description of currency would have been a tender by the terms of the agreement.

3. Parol evidence is admissible to show and to explain a latent ambiguity in a contract. Philips' Evidence, 410.

When the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by evidence of something extrinsic, this ambiguity may be raised and explained by parol evidence. If we were to admit that the contract does not show which of those classes of bank paper above described the parties intended, parol evidence would be admissible to prove to which of these the parties had reference. It was proposed to prove that there were two kinds of notes in circulation, unequal in value. This raises an ambiguity. We then offer parol evidence to show that the depreciated bank paper was intended, by proving that the majority of circulating bank notes was the most current in the ordinary course of business; and from the application of the above rule of construction, that where a contract, from the exhibition of testimony, imports that two acts may be performed, equally described by the terms of the contract, the interpretation most favorable to the obligor shall prevail. We offer to prove that performance of the contract according to the intentions and contemplation of the \*parties, became impossible by an [187 event unexpected and beyond the control of the parties. Justice would then require that the consideration or its value should be restored. The evidence proposed shows that the consideration must have been valued in depreciated paper. If the plaintiff receives its value in specie, the agreement will be substantially, if not specifically performed. He expected to receive current bank paper, to be used by him in the payment of debts or in the purchase of property. If he should be paid in specie to the value of this expected paper, the contract will be substantially performed.

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J. ALEXANDER, contra :

The contract on which this suit is founded is correctly stated by the plaintiff in error, and is the one on which the defendant obtained judgment in the court below. But it is contended that the court erred in overruling evidence offered by the plaintiff, because: 1. "The language of the contract imports that other currency was intended than specie, or bank notes passing as specie, for the sums of money apparently due on the face of the notes." 2. That "parol evidence is admissible to show to the court the subject matter of a written contract, unless it be for the payment of lawful money, or the damages be assessed by express stipulation in the agreement." 3. That "parol evidence is admissible to show and explain a latent ambiguity in the contract."

Suppose the three positions taken by the plaintiff shall be admitted as truisms, will they, or either of them, aid him in his objections to the judgment of the court below? I say no. And to test the objections of the plaintiff to the judgment of the court below, in overruling the testimony by him offered, we must examine the bill of exceptions in the record set forth, and also the plea of the plaintiff (defendant below), and by them we shall see what evidence was offered, and whether it was competent under the issue made by the pleadings.

In the first place, whether any bank notes, and what bank notes, were current at *Xenia* (for there payment was to be made), is a fact to be ascertained by proof; and it being part of the "history" of the country that all bank notes were not current, it was important that the plaintiff, in offering to prove that bank notes were current or were not current, to state what kind of notes they were, that the other party might prepare to rebut, if he could do so. It would be necessary, surely, in a plea of tender, for the party in his plea to show the particular kind of bank notes, and I think equally so in this case; otherwise no man could [188] or would say, I presume, that \*bank notes, without describing them, were current at a particular time and place. Under this contract, I think, it was important that the plaintiff should have offered to prove, that bank notes were current at *Xenia*, by the "popular" meaning of the words of the contract; for I presume that it would be deemed idle for him to have offered to prove that bank notes were current in England, France, or *Kentucky*, and to prove their value at any other place than at *Xenia*.

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Having thus disposed of the first two objections, I will very briefly answer the third.

That a latent ambiguity may be explained by parol evidence is not denied, but a patent ambiguity can not; and if there is any ambiguity on the face of this contract, it is of the latter kind; and ambiguity must consist in the fact, that whether the plaintiff did or did not pay the amount of his note in the manner and by the time stipulated on the face of it, yet he was never to pay it in money, but by some scale of depreciation unknown on the face of the contract, and equally unknown in the law. Such is the only possible ambiguity which I am able to discover or imagine by reading this contract. The plaintiff might have raised one of another kind if he had tendered bank notes in payment in due time, and a question had been made, whether they were current and passing in the common course of business at Xenia.

These objections to the argument of the counsel for the plaintiff in error are technical, but I think they are well warranted by the record. I am, however, willing to meet the plaintiff in error on the merits of his case; and, as Cæsar, though "a tyrant and a warrior," could not conquer and control "the meaning of words," so I have no fears that this court will change the law of contracts. The plaintiff did not pay his note in the manner, nor at the time or place stipulated on the face of it. Money, therefore, is the end of the law. To give any other construction would be too loose and uncertain for this court to give as a rule of currency in the State of Ohio. It is certainly important that but one currency should prevail in the same government (in the same state at least), whatever brokers and traders may adopt for their own convenience and to suit their own views. Their rules would be but temporary and uncertain at best. I prefer that rule which shall be uniform and permanent, and for such a one I look up to this court with confidence.

Judgment affirmed. For the grounds of the decision, see the opinion of the court in the case of *Morris v. Edwards*, post, 189.

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\*MORRIS v. EDWARDS.

Contract to pay two thousand dollars in current bank notes of the city of Cincinnati is a contract to pay money, if the notes be neither paid nor tendered at the time.

Such contract, if made in writing, is not ambiguous, and can not be explained by parol testimony.

Facts of recent occurrence, relating to a particular section of country only, can not be considered as in proof from general knowledge or recollection.

MORRIS brought an action in the supreme court of Hamilton county, upon a note in writing, in the following words:

*"On the first day of February, in the year 1822, I promise to pay James C. Morris, or order (in current bank notes of the city of Cincinnati), two thousand dollars, with interest, for value received. December 25, 1819."*

This case was put to trial on the general issue. The defendant offered evidence, that at the time of making the contract, and executing the note, business was done in Cincinnati upon a depreciated circulating medium, consisting chiefly of the notes of the banks of Cincinnati and the vicinity—that the value of property was estimated by the numerical value of these notes, and that when payment was stipulated to be made in current bank notes, property was put at a higher price than it would have been if the contract was for specie—that the difference between the numerical value and the specie value of current bank notes, when this contract was made, was thirty-three and one-third per cent.—that at the time the note became payable, there was no depreciated bank paper in circulation in Cincinnati, nothing being current but specie, or bank notes of specie value. This evidence was offered for the purpose of showing that the plaintiff ought not to recover the full sum of two thousand dollars, but two-thirds of that sum, with interest. The question, as to the admissibility of this evidence for the purpose proposed, was reserved for the decision of this court.

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WADE and HAYWARD, for plaintiff:

The principal question for the consideration of the court is, whether the sum of two thousand dollars, mentioned in said note, with the interest due thereon, shall be recovered in *specie*, out of which the following points have been made:

1. Whether there is such an ambiguity in the language or terms made use of in this note, as to require parol or other evidence to explain or ascertain its true meaning, the rights of the parties, and the extent of the defendant's liability?

\*2. Whether, by the terms of the contract, the defendant, [190 after having failed to make the payment, in the manner and at the time stipulated, is liable for the full amount of the principal sum mentioned in the note, with the interest due thereon in *specie*?

3. Whether it is competent for the defendant to offer testimony to prove a consideration *less* than that expressed in the note, or of a different character, with a view of reducing the amount of damages to be recovered?

4. Whether it is competent for the defendant to offer evidence to prove the value of "current bank notes of the city of Cincinnati," at the time said note was given, or at the time the payment thereof became due?

1. What is, and what is not a latent ambiguity, is well known and understood by the court, and need not, in this enlightened age of legal science, be a subject of discussion. The note declared on is an *entire* contract, unequivocal in its terms, and clear and explicit in its legal import. *Bank notes* is a term long since known to the law, and has received a construction, by the highest judicial tribunals. 1 Burr. 457. But if it were now to be considered for the first time, the term *current*, a word, when applied to money or any other medium of mercantile exchange, of universal and unvarying import, would remove from the expression all doubt and uncertainty, without the aid of external evidence. This note, therefore, must receive a construction from the language in which it is drawn, and not by parol proof; because the written terms of a contract, where there are no latent ambiguities, are better evidence of the intention of the parties than any parol explanation. As where, by the terms of a contract or agreement in writing, the court can give it such a construction as is known to the law, the intention of the parties and their respective rights and liabilities, are to be ascertained from the instrument itself, and no other evi-

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dence will be admitted to change or vary its legal bearing and effect. "In a written simple contract, not within the statute of frauds, where the whole agreement is reduced to writing, and in which there is no latent ambiguity, parol evidence can not be admitted to explain such contract, the language used by the parties therein being the best evidence of their intent." 6 Mass. 524; 2 Bos. & Pul. 555.

2. In the argument of the second point, it will be attempted to draw into the discussion, the peculiar circumstances of that portion or section of the state where this promissory note was executed, with a view of giving to this contract a different rule of construction \*from that which has long and uniformly been adopted as the established principle of law. But it is confidently believed that neither a temporary state of commercial embarrassments, arising from an unprofitable course of trade and mercantile transactions, nor that unfortunate state of things which grows out of the insolvency of banking institutions, by which a fictitious and fluctuating medium of exchange is left upon the community to circulate at a depreciated value—can change or alter the law of contracts, or influence a legal decision. The fluctuations in trade and in the market value of private property, and the revolutions which take place in the circulating medium of a country, although in their consequences frequently injurious to some, while they advance the pecuniary ability of others, are the subjects of legislative investigation, and not of judicial inquiry. The property of individuals is always more or less affected by unexpected events and unforeseen embarrassments, while their *rights*, as ascertained and defined by the laws of society, remain unchanged and unimpaired. What bearing, then, can the failure of banking institutions, and the consequent evils which followed their inability to meet their engagements and sustain their credit, by which a partial circulation of their paper, at a depreciated value, was permitted for a time, have upon the rights of the present plaintiff, or upon the legal construction of this note and the liability of the defendant? None is perceived, and it is supposed to be difficult to imagine any.

It is not pretended that the whole agreement of these parties was not reduced to writing, or that there is any latent ambiguity in the note, requiring the aid of parol proof to ascertain its true meaning; and it surely can not be urged, in *this suit*, that there is

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a *mistake* in the terms of the note, or that it is contrary to the truth of the case, because such a defense is not permitted in a court of law; and the party can only obtain relief by a bill in equity, at the hands of another tribunal. 7 Johns. 342; 7 Bro. P. C. 70; 1 Johns. Ch. 707; 2 Johns. Ch. 274; 3 Cranch, 419.

The language made use of in this note can not be mistaken. The words "*in current bank notes of the city of Cincinnati*," form a clear and unequivocal expression, and have a legal import and effect, which the court only can give; and if, in the mode and manner of their arrangement, any doubts should be entertained of their true meaning, or of the meaning of the whole expression, those doubts must be removed by a sound construction of the words themselves, and not by any parol explanation.

\**Bank notes* have long been considered as *money*, as *cash*, [192 and have been so decided. "They are not esteemed as goods, securities, nor documents of debt; but are treated as *money*, as *cash*, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of *money* to all intents and purposes." "They pass by a will, which bequeaths all the testator's money or cash, and are never considered as *securities* for money, but as money itself." No action will lie against the finder of a bank note, after it has been paid away in currency. 1 Burr. 457.

But, in the present case, the parties have gone further than the simple expression *bank notes*. They have said *current bank notes of the city of Cincinnati*. This, it is contended, is an expression too clear and definite to admit of any doubt. *Current bank notes*, if they have any meaning or legal effect, are the paper of such banks as pay their notes *in specie on demand*, and not such as may obtain a circulation at a *depreciated value*; and if such had not been the meaning and intention of these parties, they would have introduced some other term of qualification.

Again—here is an absolute promise to pay the sum of two thousand *dollars*, without any designation of the kind or quality of money. The words in the parenthesis must be construed as providing for the payment of that sum, *at the time stated*, in *current bank notes*, etc., without fixing upon any rate or value at which they should be received. If the promise had been to pay two thousand dollars of "*current bank notes*," etc., it is possible a different construction would have been given to the instrument.



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But, in this case, the consideration received and the promise to pay are two thousand *dollars*; and if it should be considered that *current bank notes* are not *cash*, not *money*, but merely articles of trade and speculation, as goods, wares, and merchandise, the rule of damages would still be the same,

Here the defendant has acknowledged that he has received the value of two thousand dollars, and has promised the plaintiff to pay him the same, at a certain time, with the interest, "in current bank notes," etc. He has failed to make the payment at the time and in the manner stipulated in the contract; and will the court say the measure of damages to be recovered shall be *less* than the consideration acknowledged to have been received? If the contract should be construed as an obligation for the payment of *specific articles*, the parties have fixed their value by the very terms [193] of the note itself. \*The promise to pay the principal sum *with interest*, is the strongest, if not conclusive evidence, of the amount of the debt due, and of the right of the plaintiff to recover the same in *specie*.

There is a manifest distinction between a contract to pay or deliver a certain quantity of *specific* articles, and an obligation to pay the amount of a certain sum of money in *specified* articles. In the one case, on a failure to pay and suit brought, the measure of damages would be the value of the articles promised to be paid or delivered *at the time when they were due*. In the other, the sum of money mentioned in the obligation is the amount to be recovered, the value of the articles to be paid being fixed by the parties in the terms of the contract. If A., by his promissory note in writing, expressed for value received, promise to pay or deliver to B. one hundred bushels of corn in six months from the date thereof, and fails to comply with his engagement, in an action by B. against A. on such note, B. will be entitled to recover the value of the one hundred bushels of corn, *at the time* when, by the contract, it was to have been paid or delivered. And *why*? Because the real sum due has not been liquidated by the parties in the note, and there is no other rule of damages by which the plaintiff can obtain ample and complete justice for the injury he has sustained. But if A., by his promissory note in writing, expressed for a valuable consideration, promise to pay B. the sum of one hundred dollars, *in corn*, six months after the date thereof, without stating the price at which the corn should be paid or re-

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ceived, and fails to make the payment as stipulated, in an action on this last described note, B. would be entitled to recover the said sum of one hundred dollars, with interest thereon from the time the note became due. And *why?* Because the real sum due has been ascertained and fixed by the parties in the note itself; and where, in the instrument declared on, the law has fixed the rights and liabilities of the parties, and the rule of damages to be recovered, no other rule is permitted to govern, nor is it competent for the defendant to introduce parol evidence to change or vary its legal operation. So, in the present case, the sum due on the maturity of the note has been fixed by the parties at two thousand dollars and the interest; and the provision that payment should be made in a particular kind of money, or in certain specified articles *at a particular time*, does not affect the amount due for which the defendant is now liable, nor can it change or affect the measure of the damages to be recovered.

3. It is admitted, that notwithstanding a promissory note is expressed to be for value received, the promisor, in an action by the \*promisee, may prove there was *no* consideration, or [194 that it was unlawful or against public policy; but the defendant is never permitted to give evidence of a consideration *less* than that he has acknowledged in the instrument. 1 Johns. 139; 5 Mass. 299.

Where A., by his promissory note in writing, for value received, promised to pay B. a certain sum of money *in lands* at a *stipulated price per acre*, and failed to make the payment according to his promise, in an action by B. on said note, the note itself was considered *prima facie* evidence of the value of the land, and the defendant was not permitted to show that the land was of *less* value than the consideration named in the note; and the note was considered competent evidence to support the money counts. 2 Johns. 235. "It is a settled rule that where the consideration is expressly stated in a deed, and it is not said also, and for other considerations, you can not enter into any other, for that would be contrary to the deed." 7 Johns. 342. The same rule applies in parol contracts. 1 Johns. Ch. 370.

Whether there is or is not a lawful consideration to support a promise is a matter of fact, and parol evidence may be admitted to disprove it; but where in a written contract the promise is founded on a consideration expressed to be *for value received*, it is not com-

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petent for the defendant to show, in point of pecuniary calculation, it was not equal to his obligation. Besides, although under the general issue, the defendant may give in evidence any matter which shows the plaintiff *never* had any cause of action, and also matter in *discharge* of the action, or which shows that the plaintiff, at the time of the commencement of the suit, had no subsisting cause of action; yet by our practice act, and the construction which it has received, the defendant in this suit can not, under any circumstances, go into the *amount* of the consideration of this note, without pleading the same specially, or giving to the plaintiff notice, under the general issue, that he should offer testimony for such purpose.

4. This point, as stated, will not require any discussion. If the court should be of opinion that the amount of damages to be recovered shall be the value of the bank notes mentioned in the note declared on, at the time the said note was given, or when the payment thereof became due, to be ascertained by *parol evidence*, the *plaintiff* will be bound to prove the value of such bank notes before he can obtain his judgment.

195] **ESTR**, for defendant :

1. In every contract, the intention of the parties, if it can be ascertained, should prevail.

2. This intention, in the case under consideration, is to be known from the expression in the note, "*in current bank notes of*," etc., and evidence of what they and their value were.

Whenever the circulating medium of a people changes, or undergoes any alteration, contracts will be made accordingly. This may either be general or local.

Expressions will be inserted in contracts to meet the change.

It is a fact admitted, that at the time of the execution of the note, and before, and some time since, the common circulating medium in Cincinnati and its neighborhood was the notes of their banks, and of those contiguous. It is a fact, that for three or four years nearly the whole business of the place was transacted on this paper. It is unnecessary to mention other parts of the country.

During this period the terms "current bank notes of the city of Cincinnati," "bankable paper," "current bank notes or paper," were inserted in contracts and had a meaning attached clearly and perfectly understood by the contracting parties and the com-

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munity. The prices of commodities were regulated by the change, also the real property of the town and country.

It will not be denied that, if tendered when due, the paper should have been received. It will be admitted that the paper was not equal to specie. If not paid, then, at the time, the real damage sustained was the value of the paper, and this should be the criterion of recovery.

The meaning attached to the terms above named was, that the payor was to pay the \$2,000 *in numero*, according to the face of the bank notes—not to pay the sum of \$2,000 in anything equivalent to specie. Thus a note of one of the banks for \$10, was spoken of as a note for ten dollars, was treated as such, when the real value was only \$6.66 $\frac{2}{3}$ . A contract for the payment of ten dollars “in current paper,” or “bankable paper,” etc., was clearly understood for the nominal amount according to the face of the note. If this were the understanding and intention of the parties, it would be manifestly unjust that the payor should be compelled to pay a dollar in specie for what, in his contract, was treated as a dollar in paper, and of the real value of two-thirds of a dollar in specie.

The evidence will be received, because it shows what this paper was, and its value. Besides, when a phrase is inserted in a contract, \*to adapt itself to the change in things, there is no [196 rule that a meaning should be affixed applicable to a different state.

HAMMOND, on the same side:

The action is founded upon a promissory note, by which the defendant promised to pay the plaintiff, or order, in current bank notes of the city of Cincinnati, two thousand dollars, at a future day. The amount was not paid or tendered at the day. The defendant contends that the contract was predicated upon a particular state of the business in the country where it was made, to which the terms of the note refer, and that the amount in coin that he is bound to pay must be determined by giving to the terms used in the note an interpretation connected with the history of the times in which it was made.

To this the plaintiff objects, in the first place, that it is an attempt to explain, by parol, a written contract, in which there is no ambiguity that requires or warrants such explanation.

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This objection, I think, is founded upon a mistaken view of the point. The proposition is not an offer to prove an isolated fact, confined altogether to this individual and particular contract. It is to such cases that the reasonings and the authorities of the plaintiff apply. We maintain that certain terms used in the note are to be understood and interpreted by a reference to the general state of business at the place where the note was given, a matter of fact, applicable to all similar contracts, and to be ascertained by a knowledge of the general history of the country.

The case from 1 Burr. 457, cited by the plaintiff, is full in point to support our position. The character there given of bank notes is deduced from general facts connected with the business of the country. It is not pretended that they are in fact money, but that, by the general consent of mankind, they are treated as money in the transaction of business. For what purposes, to what extent, and in what sense they are treated as money, are matters of fact which do not depend upon the particulars of the contract between the parties, but upon the general course of trade and business at the time when, and in the place where the contract is made.

Upon the hypothesis and argument of the plaintiff, the terms "in current bank notes of the city of Cincinnati," are rejected, in the construction of the note, as having neither meaning nor object; for if they import an agreement to pay two thousand dollars in money, the note would have imported the same thing had they 197] been \*omitted altogether. It would be a perfect note for the payment of two thousand dollars in money without them. The rules of interpretation do not permit courts so to interpret a written agreement, as to reject any part of it, where it is manifest that the parties contemplated that some operative effect should be given to the terms they employed—and that such was the intention here can not be doubted.

The plaintiff's argument is, that here is a promise to pay two thousand dollars—here is an acknowledgment of value received to that amount. You can neither controvert the amount nor the consideration. You may pay this sum in bank notes at the day, but these notes must be current, of the value of money or coin, and this because the general course of business has given to them the character of money. If this general course of business may be called in to aid the plaintiff in giving an interpretation to these

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terms, the defendant surely can not be precluded from resorting to it to fix and ascertain their interpretation on his part.

It is urged that the fact of a fictitious and fluctuating medium of exchange being thrown upon the community to circulate at a depreciated value, can not change or alter the law of contracts, or influence the decision of courts. And to this we agree, remarking, nevertheless, that a great deal of circumlocution is employed in the plaintiff's argument to express what would have been more easily, and full as clearly, expressed by the terms "*depreciated currency*." To make and to avoid definitions is one of the labors of a skillful controversialist. It suits the plaintiff's argument much better to obtain a definition of the terms "current bank notes," from Lord Mansfield, than from the mercantile and business vocabulary of Cincinnati, where the contract was made. But the rules of law require that the terms employed in a contract shall be interpreted in reference to the state of things prevalent in the country where the contract was made.

The fact that a depreciated currency is thrown upon the country, to circulate in the character of money, can not change the law of contracts, every man will admit. But it does not follow that this fact must be excluded from consideration in the interpretation of contracts. On the contrary, we maintain that if any reference be made to this fact in the contract, then it enters into and becomes a part of the contract itself, and must be kept steadily in view in enforcing the execution of the contract.

The promise of the defendant is to pay in current bank notes of the city of Cincinnati. We maintain that this is an [198] agreement to deliver two thousand dollars, numerically, of bank notes, passing current in trade and business as money. The plaintiff admits that if, on the day the note fell due, two thousand dollars, numerically, of notes of the Bank of Steubenville, had been tendered to him, he was bound to receive them. Such tender would have been a fair and legal offer to perform on the part of the defendant. But had the defendant tendered two thousand dollars, numerically, of the Bank of Cincinnati, the plaintiff would not admit that this tender was a fair offer to perform the contract. Why this distinction? Because the right to make the tender depended upon the fact whether the bank notes tendered passed currently in Cincinnati. This view of the case demonstrates that

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it necessarily involves other considerations than an absolute promise to pay money.

Another view of it may be presented, which places it in a still stronger light. Bank notes are intended to circulate as a fair, equal representative of coin. When they lose this character, they are said to depreciate. Their numerical value is the same, but their real value, in relation to coin or property, is different. This real value, most generally, is fluctuating; and when, in this situation, they constitute the medium of exchange upon which the business of a country is predicated, they still circulate numerically, and the price of property advances or decreases in proportion. In this case, had the notes of the banks of Cincinnati remained in circulation until the note became due, passing currently at their numerical value, while property had so appreciated as that their relative value was as one to four—that is, four numerical paper dollars would sell only for one dollar in coin—would the plaintiff have been bound to accept two thousand numerical paper dollars of the banks of Cincinnati in payment of his debt? His argument is that he would not, because none can be current bank notes but those the numerical and actual value of which are the same. This is the sole ground upon which he can stand, and if it be not tenable—if the court adjudge that the terms “*current bank notes of the city of Cincinnati*” mean bank notes that pass current in business, without regard to their numerical or actual value—then the plaintiff would agree, and, had a tender been made, would insist that the rule did not operate justly.

This contract ought to receive the same interpretation that it would have received had the state of things here suggested actually occurred. The rule laid down for the interpretation of this [199] contract \*must apply to all contracts made in similar circumstances, without reference to the time of performance. If the rule would be unjust that compelled the plaintiff to accept a numerical amount of bank notes, which was less than one-fourth of the value contemplated by the parties, it would certainly be equally unjust to adopt a rule that would compel the defendant to pay double the value at which the subject of the contract was estimated by the parties when the contract was made.

In giving an interpretation to the terms “*current bank notes of the city of Cincinnati*,” the court ought to contemplate the subject

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as they would do had a tender been made in certain bank notes claimed by the defendant to be current within the words of the note, and refused by the plaintiff upon the interpretation he now sets up. It ought not to affect the argument, that on the day this note fell due, no bank notes were current in business but such as were actually and numerically of the same value. The rights of the parties do not depend upon the state of things existing at the time the contract is to be performed, but must be governed and determined by the state of things as they stood at the time the contract was made. These rights ought not to be affected by the fluctuation of the circulating medium, nor by the appreciation or depreciation of property which takes place to meet this fluctuation. At the time the contract was made, the parties compared the property for which the note was given with the then circulation of bank notes current in Cincinnati. It was estimated as equal to two thousand dollars of the numerical amount of these notes, and the plaintiff agreed to receive that sum, numerically, of circulating current bank notes. While this circulation remained afloat and current in Cincinnati, the real relative value of the property and the notes must have remained about the same thing. But the numerical value of the notes, and the estimated value of the property, could not remain in the same proportion to each other. In reference to property, as the real value of the notes decreased, their numerical value increased, and property being estimated by the increased numerical value of the notes, appreciated also. The necessary and inevitable operation of this course of things was, that the notes, in process of time, must cease to have any actual value, and no longer serve as a standard by which to estimate the value of property. When this took place, the notes disappeared entirely, and the fictitious value or estimation which their circulation gave to property, disappeared also. Contracts made during the time when trade and business were in this situation, ought not to be enforced without re- [200] currence to the actual value of the subjects at the time the contracts were made—more especially where the parties themselves, as in this case, have predicated their contract upon the circumstances of the day, and have so written it down.

The relation which the actual value of current bank notes bore to their numerical value at the time this contract was made, is a matter of fact, which, if it can be ascertained, decides at once the real just rights of the parties.



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The state of business in Cincinnati in 1819, the place where and the time when the contract was made, is a matter of which the court must take notice without requiring proof. It is a portion of the history of our state, not the less to be regarded because of very recent date. The contract of the parties contains upon its face intrinsic evidence that it was founded upon the condition and state of business then prevalent in that section of the country. What, then, was this state of the country, known from its history, upon which the contract is founded and to which it refers? It was this: all business was transacted upon a circulating medium consisting of bank notes, the numerical value of which was greater than their real value, and that all contracts were based upon the numerical, not the real value of these notes; that there was from time to time a difference between their real and numerical value, which was regarded in the making of contracts, and which can be established by proof so as to be made applicable to contracts entered into at different periods of time.

The promise here being to pay in this description of bank notes, as we interpret it, and the very terms of the promise asserting the nature of the consideration, or rather its character, as being equivalent only to the numerical value of two thousand dollars of or in bank notes such as then constituted the money circulation of Cincinnati, we insist that the only standard by which the plaintiff can measure his damages is the actual value of the notes at the time the contract was made. This standard is fair and just for all parties. It relieves all from the uncertainty of what may be the numerical value of the notes at a future day, and gives to contracts made during these times a certainty and mutuality that no other rule can give.

Parol evidence to prove what was the real value of bank notes current in Cincinnati on the 25th December, 1819, is not offered to explain an ambiguity on the face of the note, nor to prove a consideration different from that expressed upon the face of it. But it **201** \*is offered to prove what is the real value of the consideration expressed. And its admission is founded upon the well-known historical fact, that contracts which stipulate upon a value in bank notes are predicated upon a numerical, and not an actual value. Evidence to establish this actual value is received upon the same principle that evidence is admitted to prove the actual value of

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two thousand bushels of corn, were a contract made to deliver that quantity of corn, and suit brought upon it.

In the case of the corn, the actual value, at the time it should have been delivered, must be the rule of damages. And the reason is, that the party purchasing must have made his purchase with a view to the value of the article at the time of delivery. This is the general rule. But if the contract stipulated, that upon the delivery the payment should be made in current bank paper, at fifty cents per bushel, and upon the day of delivery the real value of corn was twenty-five cents per bushel, and the real value of current bank paper was fifty cents upon the dollar, a court of justice surely could not say that the paper price to be paid per bushel by the plaintiff, must be deemed the actual specie price against the defendant. And yet the argument of the plaintiff upon this point leads precisely to this conclusion.

The whole argument of the plaintiff proceeds upon the idea that legal and technical rules so operate as to compel the court to shut their eyes to the real facts of the case, and adjudicate in a blindfold state. Current bank notes are regarded in England, or rather were regarded in England seventy years ago, as money. Therefore, current bank notes of the city of Cincinnati, in Ohio, in 1819, are to be understood in all contracts as equivalent to money. The consideration of a promissory note can not be proved to be less than the amount expressed on the face of it (which, by the by, stands upon no principle). Therefore, you shall not ascertain the true value, where it is plain that a numerical, and not a real value is expressed. This appears to me the true state of the plaintiff's argument; and if such be its character, it is surely clear that the premises do not support the conclusions.

If this contract is really to be regarded as an agreement to pay two thousand dollars in money for a property fairly estimated to be worth that in money, by the parties, and the agreement to receive current bank notes, of specie value, instead of insisting upon specie, is inserted as a privilege to the defendant, in making payment, then the plaintiff's argument is well founded. But if this be not the character of the transaction—if it be such [202 as I insist it is, and that is a fact of which the court are bound to take notice in part, and to receive proof as to the remainder, then the plaintiff's argument is misconceived, and can not avail him.

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WADE and HAYWARD, in reply:

It is not contended that bank notes are money, but that, in legal contemplation, they are to be considered and estimated of the same *value*. Lord Mansfield so considered them; and the reason was, because they passed in *currency*, on a par with *specie*.

The resort to Lord Mansfield for a construction of the terms "current bank notes," arose from *necessity*, and not from a disposition to avoid any other definition which had been given to them by the general consent of mankind, or by the merchants and men of business at Cincinnati. The history of those times, when the paper of the insolvent banks of Cincinnati was permitted to circulate at a depreciated value, does not furnish any definition to these terms. They were not then in general use. "*Bankable money*" was a term in general use, and universally understood at that place, during the whole of that period; and it is expressly denied that any particular definition has ever been given and generally understood, by the men of business and others at Cincinnati, to the terms "current bank notes," or "current bank notes of the city of Cincinnati;" and they have no other meaning, at that place, than such as is given to them by a sound legal construction. And the plaintiff contends and insists, that this contract does *not* "contain upon its face intrinsic evidence that it was founded upon the condition and state of business then prevalent in that section of country."

The defendant is mistaken, when he supposes "the plaintiff's argument proceeds upon the idea, that legal technical rules so operate as to compel the court to shut their eyes to the real facts in the case, and to adjudicate in a blindfold state." The plaintiff contends, his argument is founded upon the well-known and long-established principles of law, and the plainest dictates of reason and common sense; and he urges it upon the court, to prevent injustice and a serious injury to himself.

With what reason can the defendant now insist, that his case is to be adjudicated by the same rules as it would have been had he made a lawful tender of the bank notes described in the note declared on? He is now in a very different situation. Had he made the tender when the note had become due, the plaintiff would *have* 203] *\*had* an opportunity of obtaining the two thousand dollars, in *specie*, for the notes tendered, and the defendant could not have been charged with a violation of his contract. But the defendant has elected a different course. He retains the "current bank notes"

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in his own hands, or obtains the specie for them—suffers himself to be sued on his note, and claims to be discharged on the payment of two-thirds of the sum due, and thereby speculate upon his own contract, and upon that, too, in which he has been guilty of a breach of good faith! This might all be done, if the doctrine contended for by the defendant should be sanctioned by the court. Whereas, if the defendant had paid the note at the time and in the manner therein stipulated, the plaintiff might have long since realized his two thousand dollars in *specie*. And it is asked, who is entitled to the benefit of obtaining the sum of two thousand dollars in specie, for the proceeds of these “current bank notes?” The plaintiff, who has been kept out of his money, or the defendant, who has refused to comply with his engagements? This question is asked, on the supposition that the consideration and promise are considered to be two thousand dollars of current bank notes,” and that these notes, at the time the payment became due, were circulating at a value below the par of specie. But a different construction must prevail. The contract is an obligation, on the part of the defendant, to pay the plaintiff the sum of two thousand dollars, *in a particular kind of money, at a stated time*. He has not done it, and the rule of damages has been fixed by the parties themselves, in the instrument itself. The sum due was liquidated at the time the contract was made, and makes a part of it. The plaintiff, therefore, insists that he is entitled to judgment for the sum of two thousand dollars, with the interest thereon from the first day of February, 1821.

Judge HITCHCOCK:

This case presents two questions to the consideration of the court:

1. Whether the sum of two thousand dollars, mentioned in the contract, with the interest due thereon, shall be recovered?
2. If, in the opinion of the court, this sum can not be recovered, whether the damages are to be ascertained by proof of the value of “current bank notes of the city of Cincinnati,” on the day the contract was entered into, or on the day when the payment fell due?

That the first question may be correctly decided, it is necessary to ascertain what character is to be attached to bank notes. If they are considered as money, then this contract is a contract for

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204] money; \*if not, it is a contract for the payment of a certain sum in specific articles. By the term money, we generally understand that which is the lawful currency of the country—that which may be tendered, and must be received in discharge of a subsisting debt. With this understanding of the term, it can not be contended that bank notes are, in themselves, considered money. They are not a lawful tender. No person is bound to receive them in discharge of a debt, unless in pursuance of a previous contract. But for certain purposes, and in fact for every purpose, in the ordinary transaction of business, bank notes, it is believed, ever have been and still are considered as money. They do not come under the denomination of goods, wares, and merchandise. Evidence of the receipt of bank notes will support an action for money had and received. The delivery and receipt of them, in discharge of a debt, will be considered as payment of so much money, not as accord and satisfaction. By the universal consent of mankind, when they pass from one to another, they pass as money. In the course of business, they are charged and credited as cash, as money. They have been estimated as money, not only by men of business, but by courts of justice. Lord Mansfield, in speaking of bank notes, says, "They are not esteemed as goods, securities, nor documents of debt; but are located as money, as cash in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes." "They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself." 1 Bur. 457. The Supreme Court of the State of New York say that bank notes are considered as money—that a note for a certain sum payable in bank paper is a note for money, and of course a promissory note within their statute. 9 Johns. This court, in the case of *Smith v. Houston*, submitted in Licking county, in the year 1820, in giving a construction to the "act to prohibit the issuing and circulating of unauthorized bank paper," after a consultation of all the judges, decided that bank notes must be considered as money. 14 Stat. 10. The statute law of this state, entitled "an act making certain instruments of writing negotiable," provides, "that all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order," etc., shall be negotiable

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by indorsement thereon, etc. Vol. 18, p. 163. In giving a construction to this statute, we hold that a note drawn for a sum certain, payable in bank paper, *is* negotiable. This opinion can [205] be justified upon no other ground than by considering bank notes as money.

Apply these principles to the case under consideration, and what will be the result? Edwards, for a valuable consideration, promises to pay Morris or order, on a certain day, two thousand dollars, with interest annually. The payment is to be made "in current bank notes of the city of Cincinnati." Such are the terms of the contract. When the day of payment arrives, there is no offer to pay—there is no tender of bank notes. Had the note been transferred, by indorsement, to a third person, that third person, as indorsee, might have maintained an action against Edwards as maker of a promissory note. We should not have hesitated to render a judgment in favor of the indorsee. And why? Because the note would have been considered as a note for money. If it be a note for money, as I think it must be considered both upon principle and authority, there can, I apprehend, be no doubt that the plaintiff is entitled to a judgment for the full amount of two thousand dollars, with the interest.

But suppose we take another view of the case, and consider bank notes, not as money, but as specific articles—will this lead to a different conclusion? Or will the plaintiff be compelled to receive a sum less than that named in the note? Where a contract is entered into for the payment of one hundred bushels of wheat, at a certain time, and the wheat is not delivered, the rule of damages will be the value of the wheat when it should have been delivered. If, however, the contract be for the payment of one hundred dollars, in wheat, or of one hundred bushels of wheat at one dollar per bushel, and payment be not made, it will not be doubted but that a plaintiff, seeking to recover damages upon such contract for its violation, would be entitled to one hundred dollars. It would at once be said that the damages were liquidated or agreed upon by the parties. In the case under consideration, Edwards promises to pay two thousand dollars "in current bank notes of the city of Cincinnati." This promise is not performed—the bank notes are not paid. What must be the rule of damages? I would suppose, if bank notes are considered in the same light, and as possessing the same character as other specific articles, we

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must say at once, that the parties had fixed the rule of damages, and that the plaintiff must recover the amount named in the contract. I am sensible that it has been urged in argument, that in the contract under consideration, the word *in* must be interpreted 206] to mean *of*, and that this contract should \*be considered the same as if it had been for the payment of two thousand dollars of current bank notes. Is there anything, however, in the contract itself that would justify this interpretation, or justify the court in changing the meaning of words? It appears to me that there is not, unless we attach a character to bank notes different, in some respects at least, from that which we attach to specific articles.

Counsel for the defendant insist, that whether we consider bank notes as money, and this contract a money contract, or whether we consider it as a contract for a certain sum payable in specific articles, injustice is done to him, inasmuch as such could not have been the intention of the contracting parties. In interpreting contracts, the great object always is to arrive at the intention; and if in giving the construction to the contract, before the court, which I am disposed to give, injustice is done to either party, I sincerely regret it. The law, however, has fixed and established certain rules, by which all contracts are to be interpreted; and it would be dangerous to depart from these rules to accommodate a particular case or class of cases. No principle can be better settled than this, that in the interpretation of contracts, the words or terms made use of, taken in connection with the subject matter, are the only things which can be looked to. You shall collect the meaning of parties by their words; every contract must be interpreted by itself. Resort can not be had to parol or extrinsic evidence, except where there is an ambiguity not apparent upon the face of the contract. If there is an apparent ambiguity, even this can not be explained. The contract before the court is very explicit. If the parties had intended this as a promise to pay two thousand dollars of bank notes numerically, it could have been easily expressed. If they intended that, in the event of the failure of the defendant to pay the bank notes, he should be discharged by the payment of a less sum in money or specie, this intention could with equal ease have been expressed. As neither is expressed, I must infer that such was not the intention, and am of opinion that parol evidence can not be received by way of explanation to lead to a different conclusion. In fact, the effect of such

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testimony, if received, would not be to explain this contract, but to prove one materially variant in its terms and conditions. Counsel for the defendant do not deny that it would be improper to receive this species of evidence.

It is contended, however, that this contract was predicated upon a particular state of business in the country where it was made, to \*which the terms of the note refer, and that the amount [207 which the defendant is bound to pay must be determined by giving to the terms used in the note an interpretation connected with the history of the times in which it was made.

The contract was made in Cincinnati, and bears date in the year 1819. It is said, in substance, that in the course of that year the paper of the banks of that place had depreciated—that there was a difference between its real and numerical value—that this depreciated paper was the principal circulating medium of exchange—that it was in common parlance denominated “currency,” or “current bank paper,” to distinguish it from that description of bank paper whose real and numerical value was the same—that the term “current,” which, when applied to money, has been understood to mean that which is lawful, and when applied to bank paper that which is equal to specie, was here understood to mean paper which was depreciated—that contracts similar to this were made with the understanding that they should be discharged with this depreciated paper, which is denominated *currency*, or in specie of equivalent value, and in fact that the character of bank notes was changed; that they were no longer considered as money, but similar to any other specific article, and that a promise to pay two thousand dollars in this kind of property or paper, was understood to be a promise to pay that amount of it according to its numerical value. And it is further contended, that the court are bound to know these facts as matters of public history, and apply them in the construction of the contract under consideration. The argument raised upon this state of facts is entitled to great consideration, and if the case was a new one would undoubtedly have much influence. But before we adopt the principle contended for, it may be well to examine a little as to consequences. These facts can not be proved by parol, because they would lead to a construction of the contract different from what its terms justify; yet the court are bound to know them as matters of public history. Public history, not of the state at large, but of a particular town or



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city. It is to be recollected that contracts similar to the one before the court have been frequently made in this state, especially since the year 1812. Makers of notes have promised to pay certain sums "in current bank notes," in "eastern or western bank notes or paper," in the notes of a particular bank or of the banks of a particular place. Almost every variety of expression has been adopted that could be thought of. This mode of transacting business grew out of the state of the circulating medium, and was 208] adopted \*sometimes for the accommodation of the creditor, but more generally for the accommodation of the debtor. These promises have not always been complied with, and suits have been brought to compel judgment. Judgments have been recovered and enforced by execution. This court have in cases of default without hesitation assessed the damages without the intervention of a jury, and in every instance previous to the year 1822 it is believed the rule of damages has been the sum named in the contract, together with the interest. This has been the practice, not in one particular county, but throughout the state. So far as a uniform course of decisions, when any particular subject can settle the law upon that subject, it would seem that the rule of law, or the law itself, applicable to this subject, was well settled. It must be recollected, also, that this court, in giving construction to contracts, can not interpret the same terms, or words made use of in contracts, to mean one thing in one part of the state and a different thing in another. The rule of law must be uniform with the whole body of the people. The same words used in a grant would convey an estate of inheritance in the county of Trumbull or Hamilton; and it will be contended that if by general consent the inhabitants of the county of Trumbull should attach a meaning to those terms which in a grant convey an estate of inheritance, different from that which the law attaches, that the court would be justified in changing the interpretation of those terms to meet the feelings, wishes, or general consent of the people in that particular section of country. In interpreting contracts, the law of the place where the contract is made is to govern. But in what does the law of Cincinnati and its vicinity differ from the law in Cleveland or Steubenville? Previous to the year 1819 it is not contended that there was any difference as to the principles applicable to the cases similar to the one before the court. We are called upon, however, to know certain facts which have transpired since that period, as

matters of public history which must go to change these principles in that particular section of country, so that a rule of law is to prevail different from that which prevails in other parts of the state. If this be correct, may not the same innovation be made by every town or village in the state; and may we not be left in this predicament, that agreements containing precisely the same terms, and relating to the same subject matter, must be construed to mean different things, according to the understanding of the people in the various counties, or even towns, in which they shall be executed? It does appear to me that this is carrying the rule that \*the *lex loci* must govern to an unreasonable length. [209 True, the citizens of Cincinnati, as well as the citizens of any other incorporated town or village, may, according to their acts of incorporation, establish rules for their own internal regulations; but can they contravene the general law of the land—can they change the law of contracts?

As was before observed, if this were a new case, and of the first impression, the argument of the defendant would undoubtedly have great weight. But I conceive that the law on the subject has been long settled; that the rules for the interpretation of this species of contract were well understood previous to the year 1819; and that the circumstance that a fictitious medium of exchange was then thrown upon a particular section of our country can not change these rules. It is better that a temporary or partial inconvenience should be sustained, than that the general and well-established principles of law should be violated or even changed.

But we may well inquire whether these facts constitute such matters of history that courts are bound to take notice of them. Certain facts, which are properly matters of history, have been long since transacted, and of which no person can give testimony, may be proved by ancient history of the times in which they were transacted. *Neale v. Fry*, cited *Salkeld*, 281. But a particular custom can not be thus proved. The reason why public history is admitted as evidence seems to be, that the facts necessary to be established are properly subjects of history, and because of the extreme difficulty or utter impossibility of establishing those facts by any other testimony. But the facts which the court are called upon to know in the present case are such as have recently transpired, and must be in the knowledge of those persons who were in business at the time.

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It is urged in argument, that if in the present case we allow the plaintiff to recover any more than the specific value of two thousand dollars of depreciated bank paper, at the time the contract was made, injustice will be done, because he will receive a greater value than the consideration which he gave. This argument is raised upon the supposition that property at the time was estimated to be worth a greater nominal amount, in proportion as the paper of the banks had depreciated. But if this consideration is to influence the court, the argument may be urged with equal force, in estimating the damages in another class of contracts. *Property contracts* are as well known and understood in different parts of the state as *currency contracts* can be in any particular section. The owner of any specific article of property is willing to sell that 210] property for a certain sum in money, or he will sell it for a sum twenty-five or thirty per cent. greater, and receive his pay in property of the same or a different description. The purchaser, consulting what he conceives to be his interest, agrees to take the property offered for sale, at the advanced price, and pay in specific articles. The bargain is completed, and the vendee contracts to pay the vendor a certain sum in these specific articles. This contract is not complied with. The articles are not delivered, nor even tendered, at the time when due. Suit is commenced and judgment recovered. The damages uniformly assessed are the amount specified in the contract, without reference to the specific or money value of the property transferred, which was the consideration of the contract. The defendant is compelled to pay twenty-five or thirty per cent. more than the amount for which he could in the first instance have obtained the property which he purchased. Is not his case hard? Yet he can obtain no relief. If he complains he will be told: "You might have contracted differently; if it was understood that in the event of your failure to deliver the specific articles you were to pay a less sum in money, it should have been so expressed; as it is not, you have by your contract agreed upon the amount you must pay. True, you had your election to pay this amount in property; but as you have not complied with your contract, you must pay it in money."

If these principles are correct when applied to *property contracts*, they must be equally so when applied to *currency contracts*. The loss which a defendant in either case sustains is not attributable to the plaintiff; it is not attributable to the law, but to his own

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neglect, to his carelessness in not performing, or perhaps, in some instances, to his misfortune in not being able to perform his engagements. Upon the whole, whether I consider the note in suit as a note for money, on the principle that bank notes have been and still are considered as money, or whether I consider it a note for a certain sum, payable in specific articles, I must come to this conclusion, that the plaintiff is entitled to judgment for the amount named in the note, together with the interest which remains unpaid.

Entertaining this opinion, it seems unnecessary to examine the second question raised in the case, that is, whether, admitting that the plaintiff is not entitled to recover the full amount of two thousand dollars, but merely the specific value of two thousand dollars of "current bank paper of the city of Cincinnati," the damages shall be ascertained by proof of the value of that paper when the contract was made, or when the payment became due. If the same character is attached to bank notes as is attached to [211 other specific articles, the same rules of law must be applied in interpreting a contract which by its terms is to be discharged by the payment of this paper, as if it were to be discharged by the delivery of any other article of property. It will not do to treat it as money for one purpose and as property of a different description for another. In cases of contracts for the delivery of specific articles, one hundred bushels of wheat, for instance, to be delivered on a certain day, the law has said that the rule of damages shall be, not the value of the wheat on the day the contract was made, but on the day the wheat should have been delivered. If bank notes are considered as specific property, why should not the same rule be applied as to them? I am aware that it is said, when property is sold and payment is to be made in bank notes, either at the time of sale or at a future day, reference will be had to the value of those notes on the day of sale, and not to the value which may be attached to them at a future period. This is undoubtedly true, but the same reference is had to the value of wheat, or of any other specific article, at the time of contracting, provided the payment is to be made in wheat or such other specific articles. It is, however, to the contracting parties that the value of the article may be increased or diminished, and they contract possessing this knowledge. Still no change of value in the property can change the rule of damages, and if it were necessary in the present case to

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express an opinion on this question, I should say that the value of the "current bank notes" named in the contract, or on the day of payment, must be the rule by which a court would be governed in assessing damages.

**Judge PEASE:**

I concur generally in the opinion expressed by Judge Hitchcock. But the case may be viewed in two aspects in which it is not presented, both of which I conceive of some importance.

Although the bank notes that formed, at one time, the circulating medium of Cincinnati and other sections of the state were *depreciated in market*, the *legal obligation*, on the part of the banks that issued them, to pay their full numerical value, *was not depreciated*. In this respect the case differs materially from a contract to pay or deliver other articles of personal property. When such is the contract the party who is to receive the property, if he receive it, can get no more for it in money than it will bring in market; and when not delivered, if he bring a suit he can recover [212] a judgment for no \*greater sum than its market value at the time it should have been delivered. This market value is the rule of damages. Where the creditor receives of his debtor bank notes, he need not, unless he prefers it, resort to their market value for any purpose. He is not obliged to accept of law or of justice as either may be dealt out to him at a broker's shop. He may resort to a court of justice, and there he can obtain judgment against the bank that issued the notes, for their numerical amount, without regard to their *market value*. The ability of the bank to pay has nothing to do with the sum for which judgment must be rendered.

*Market price* is a proper rule of damages in those cases where, if the article be received, it can, by no possible means, be converted into money, except through the medium of the market. But where the law will convert it into a judgment for a certain amount, that amount ought to be the rule of damages, when the article is not delivered. The *market price* has no bearing on the subject. The sum specified on the face of the notes determines the amount for which judgment must be rendered against the bank.

There is, I conceive, no analogy between the case of depreciated bank notes and the depreciated continental currency. The conti-

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mental bills were issued by the government, against which payment could not be coerced by judicial process. An effective judgment could not be obtained against any one for their numerical value. In this respect there is a strong and marked distinction between the two cases. But this is not all.

In some, if not in all the states, the continental bills were made by law a legal tender in payment of debts, and in discharge of contracts. When these laws were repealed, the debtors were deprived of the means of paying their debts in a currency which was abundant, and which was legal and current for all purposes when the debts were contracted. These contracts might be considered as made upon the faith reposed in the public law, that they could be discharged in continental bills; and when the right to do this was taken away by law, a strong case was presented for originating some equitable mode of affording relief to the debtor and doing justice to all parties. Yet I know of no case where the courts interfered upon general principles. It was not until legislative recommendations, or positive laws, suggested a course, that a scale of depreciation was adopted.

Our laws never made bank notes a legal tender, and have never changed their legal character. The debtors have no such thing to \*complain of. They know the hazard in speculating, with [213 the intention of making payment in depreciated bank notes. If the course of events, or their own negligence, in not complying with their contracts, has made their speculation a bad one, their case, in the view of justice, calls for no extraordinary interference of the courts to aid them at the expense of the creditor.

Judge SHERMAN concurred.

Judge BURNET dissented:

As I can not concur in the opinion of the court, given in this case, I will state my own view of the subject which will show the reasons of my dissent.

The action is brought on a promissory note, dated December 25, 1819, in the following words: "On the first day of February, in the year 1822, I promise to pay James C. Morris, or order, *in current bank notes of the city of Cincinnati*, two thousand dollars, with interest payable annually, for value received." By an indorse-

ment on the note, it appears that the interest has been paid till the first of February, 1821.

The defendant proposes to prove that at the time this note was given, and when it became payable, the notes of all the banks of the city of Cincinnati were depreciated in value, and were received at a discount in exchange for specie, or in payment of specie debts; and that it was the intention of the parties, inferable from the common use and practice of the neighborhood, in similar cases, and from the circumstances attending this particular case, as well as from the import of the words used in the contract, that the plaintiff should receive the *nominal* sum stated in the note, in the depreciated currency described, or the specie value of so much of that currency. He also proposes to prove that the note was given for a part of the consideration of a tract of land, and that it was the universal custom of the Miami country, at that time, in all contracts of a similar nature, to stipulate for a price, in reference to the value of current paper; and where the purchaser would agree to pay in specie, that a deduction was always made from the price, equal to the depreciation of the paper, and that this particular contract was made in reference to, and in conformity with, that custom; that the actual value of currency, at the date of these contracts, was generally referred to, and not its probable value when the payment might become due; and that, at the date of this note, the depreciation of current bank notes of the city of Cincinnati, was thirty-three and one-third per cent.

214] \*The plaintiff objects to the whole of this testimony. He insists that "the legal effect of the note is to pay the sum of two thousand specie dollars, with interest; that the expression 'current bank notes of the city of Cincinnati,' in legal import, means the notes of such banks as pay their notes in specie, on demand, and not those that circulate at a depreciated value." It is also contended that there is not such a latent ambiguity in this note, as requires any parol proof, or other evidence, to explain or ascertain its true meaning; that if any ambiguity does exist, it is a patent one, and must receive a construction, exclusively, from the language made use of in the instrument.

The reverse of these propositions is insisted on by the defendant, who contends that the recovery ought not to be for the full amount of the note in specie, but for an amount to be ascertained by a reference to the value of "current bank notes of the city of

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Cincinnati," either at the date of the note, or on the day on which it became payable.

It is difficult to ascertain by what course of reasoning a promise to pay bank notes of a particular description, can have the legal effect of a promise to pay specie. With equal propriety it might be contended that an engagement to deliver flour, was, in law, a promise to pay specie; for, in either case, if the thing contracted for be not delivered or paid, and a recovery be had on the contract, the judgment must be rendered for specie, and not for the specific article. It does not, however, follow that the plaintiff has a right to demand specie, or that the defendant is bound to pay it. The reverse of the proposition is true; such a right or such a liability does not exist. The legal effect of a promise (in the sense in which the plaintiff uses that phrase), is the liability created by it, or that which the party to whom it is made has a right to demand. In this case, the promise is for bank notes—the right of the plaintiff is to demand bank notes, and the legal effect of the promise must be to pay or deliver them.

It is equally difficult to see the correctness of the construction given to the expression *current bank notes of the city of Cincinnati*. The description given of them does not present the idea of their being paid, on demand, in specie. The contract is silent on that head, and to supply the omission would materially change its obligation; it would require the defendant to do that which the terms of his contract do not embrace. The description contains but two requisites—the notes must be current, and of the banks of the city of Cincinnati. Notes are current when they pass freely in [215] the common transactions of business, either at their par value or at any other value, ascribed to them by common consent; and if they so pass they are current, whatever may be their value in reference to a specie standard, or whatever may be the manner in which the banks redeem them.

If the paper of one bank passes freely at its face, or at par, and the paper of another passes as freely at a discount of ten or twenty per cent., they are in fact equally current, though not of equal value; and it may happen that a majority of the community would prefer the depreciated paper to that which is passing at par; and a difference may exist, in reference to this quality, in favor of those that pass at a discount—they may be the most current. It can not be admitted that the contract calls for such notes as were redeemed



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in specie on demand, unless it be taken for granted that at the date of the contract the notes of no bank in the city, which were not redeemed in specie on demand, were current; but with this admission, it would be true, not because the notes were so redeemed, but because no other description of notes were current. The fact, however, was otherwise. The notes of all the banks of the city were depreciated, and none of them were paid in specie on demand. It would, therefore, follow, from the plaintiff's construction, that there were no bank notes in existence of the description called for, and that it was impossible to perform the contract. In support of this construction, it seems to be taken for granted that the term *current* has a reference to the value of the paper, when, in fact, it relates only to the manner in which it circulates. Depreciated paper may circulate freely at its value, and pass as currently as any other, and if it does, it answers the requirements of the contract, which the court can not extend by requiring anything not included within the terms of it. If we can say the notes shall not only be current, but current at par, we may require them to be current at a premium or advance.

It is further contended that if any ambiguity exists on the face of the note it is patent, and must be explained exclusively by the language used in the instrument.

The defendant does not allege that the contract is ambiguous, nor is it necessary for him to do so; the words "current bank notes of the city of Cincinnati," are as expressive of their own meaning as "barrels of superfine flour," or "bushels of wheat;" they are definite and admit of but one construction. They necessarily include the 216] \*notes of every bank of the city that were passing freely in the common business of the day, and they exclude notes of every other description. No other interpretation can be given to the terms, nor is parol testimony necessary to explain them—they speak their own meaning. It is true that the value of those notes has not been uniform, and it is a question of fact to be decided by testimony what was their value at any particular period, but this does not arise from any ambiguity apparent on the contract, but from matter wholly extrinsic. If a contract were made for a hundred barrels of flour, or a thousand bushels of wheat, it could not be said to be ambiguous, although in an action for non-delivery it would be necessary to prove the value of the article, for which purpose parol testimony would be received without objection. This is our daily

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practice; and there does not appear to be more difficulty or impropriety in proving the value of a bank note than of a barrel of flour. The one is worth what it will command in market, the other is worth what it passes for by common consent.

The objection to parol testimony in this case, on the supposition that it is an attempt partially to affect the consideration of the note, is more specious than solid. It is not an attempt to reduce the amount of the demand, by showing that it is greater than the value of the consideration received, but to show the real demand, which is the value of the thing demandable, in order to ascertain what sum may be recovered for the non-delivery of it. If a reference should be had to the consideration, it would not be for the purpose of reducing the demand, but of showing what it originally was; it would be presumptive testimony of the value of the paper at the time of the contract.

If A. be possessed of property that he values at six hundred dollars in specie, and proposes to sell it either at that price in specie, or at nine hundred dollars in currency, which is estimated to be of the same value, and B. makes the purchase and gives his note for nine hundred dollars in current bank notes, and it becomes a question how much specie A. ought to receive for the non-payment of the bank notes, B. may prove these facts for the purpose of showing the value of the notes which was the true consideration of the purchase, and the real sum intended to be paid.

It will be admitted that all contracts are to be construed agreeably to the understanding and intention of the parties, to be collected from their language. The language of the note before us seems to be clear and intelligible; it is a promise to pay a given sum in a particular description of currency, and it binds [217] the defendant to pay as much of that currency as will, at the face of it, amount to the sum required, which was two thousand dollars. A tender, therefore, of that amount of the current bank notes of the city of Cincinnati would have been good, whatever may have been the value of those notes compared with specie.

When a contract is made to pay a given sum in bank notes, it obligates the party to pay as many of those notes as at the face of them will amount to the sum required, without reference to their value. There is, therefore, a difference between a promise to pay a given sum in produce, and a promise to pay it in bank notes; in the one case the quantity of produce is indefinite and must depend

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on its value, which is fixed and certain ; in the other, the amount is fixed and is ascertained by the sums impressed on the face of the notes, but their value is uncertain. The case before us has a strong resemblance to a contract for the delivery of a certain quantity of produce, as a hundred barrels of flour or a thousand bushels of wheat, in which case, if the property be not delivered, the rule of damage is its cash value ; for the same reason the rule of damage in this case ought to be the specie value of the notes. As in the former case, judgment can not be given for the property, but is given for the value, so in this case we can not give judgment for the bank notes, but must give it for their value, to be ascertained as in other cases.

But if this construction does not clearly result from the terms of the note—if any ambiguity is found to exist, it is a latent one, and the difficulty will vanish, and the intention of the parties become manifest by a reference to the nature and value of current bank notes, at the date of the contract, and to the general custom and understanding of the country in relation to contracts payable in such notes.

The notes of chartered banks were issued by legal authority. Each note had its amount, or the sum for which it was issued and passed, impressed on its face, and when any given sum of bank notes was spoken of, as for example a hundred dollars, the expression had a fixed, definite meaning, which was uniform and universal. Everybody who heard it understood it to mean so many notes as would amount to one hundred dollars, each note being counted at the sum, or the number of dollars impressed on its face, and it may safely be affirmed that no other meaning was ever affixed to a promise couched in such language. These facts form a part of the general history of the country. It is also a matter of history that in 1819, and for a 218] \*long time before and after, specie was out of circulation, and that current bank notes were the circulating medium of the country, notwithstanding they were much depreciated below the value of specie. Property of every description had risen considerably in value, but had risen still more in price in consequence of the quantity and depreciated quality of the circulating medium. Everything offered for sale was offered at a price fixed on by a reference to the value of bank paper, and whenever an offer was made to pay in specie, which rarely happened, a discount was made proportionate to the estimated depreciation. This practice was universal, and

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continued till efforts were made to put down the paper, when it became common to set a specie and a currency price, and to offer the purchaser his choice, which practice continued till by common consent specie prices were generally fixed; this, however, did not take place till long after the date of the contract before us. When that was made, depreciated currency was the circulating medium, and the price of everything was regulated and fixed with a reference to its value, which was known to be far below that of specie. Hence it is that the defendant in this case has promised to pay in current bank paper; if he had undertaken to pay in specie it would have been so expressed, and the amount of the note would have been proportionably reduced. It must, therefore, have been the understanding of the parties that two thousand dollars in current bank notes, without reference to their value, should be paid, and not the value of two thousand specie dollars in current paper, as is contended for by the counsel. The common usage and universal understanding of the country condemn this construction; not a solitary case can be cited in which it has prevailed. If this were not the case, why were these words inserted in the note? Why was it not drawn generally without designating currency? It undoubtedly would have been so drawn if the plaintiff's construction were correct. The court can not alter contracts, or give them a construction contrary to the legal and manifest intent of the parties. Such a power is denied to the legislatures of the states, and ought not to be possessed by any tribunal.

In this case the defendant has promised to pay a certain amount of current bank paper, which he has not done. By the law of contracts he is liable to render the value of that paper and nothing more; but we are called upon to say that he shall pay as many dollars in specie as he has bound himself to pay in paper, without inquiring into its value. This would certainly be changing the nature and obligation of the contract. We might with the [219] same propriety say that a person who has promised two thousand bushels of wheat shall pay two thousand dollars, without reference to the value of wheat. At the date of this contract there was about the same difference between the value of a paper and a specie dollar as between a bushel of wheat and a specie dollar.

There appears to be a strong analogy between this contract and contracts which were made during the revolutionary war, when continental money was in circulation, on which the rule of decision

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seems to have been, that the plaintiff should recover the value of the currency, agreeably to the scale of depreciation at the date of the contract. The principal distinction seems to be, that in the one case the depreciation was fixed by law, while in the other it depended on public opinion. In the case of *Wheaton v. Morris*, 1 Dall. 124, the contract was on a sale of tobacco, in March, 1777, when the scale of depreciation was at the rate of five for one. The bond was in the penal sum of twelve thousand pounds, *lawful current money of Pennsylvania*, payable in September, 1782, when continental money had sunk and was out of circulation, and the only current money of the state was gold and silver. No payment or tender had been made. The only evidence given was the contract—the bond, the price of tobacco, and that one of the defendants had offered to pay the value of the tobacco and interest. The court charged the jury, that lawful current money, when the contract was made, was the money emitted under the authority of Congress; that the bond should be taken, as relating to that species of money, and left it to them, on an equitable and conscientious interpretation of the agreement, to reduce the sum, according to the scale of depreciation, or to find the specie value of the property, with interest from the day of sale.

From the short note of *Lee v. Beddes*, 1 Dall. 175, it appears that the same principle was there recognized, that current lawful money meant such money as was current at the time of the contract, which in that case was continental money, and the court refused to receive testimony to prove that other money was intended.

In the case of *Bond v. Haas*, 2 Dall. 133, the contract was for the payment of two hundred and fifty pounds, current money of Pennsylvania, dated in August, 1777, payable in one year. At the date of the contract continental money was depreciated, and was at three for one. The plaintiff insisted that the whole sum should be paid in specie, and offered parol proof that such was the understanding of the parties. The testimony was rejected on the 220] ground that it \*did not explain the contract, but would be in effect altering it, and increasing the value of the money. It seems to follow as a corollary from this case, that if a contract calls for current money, and it is ascertained that the words "current money" meant current bank notes, the contract is to be discharged in those notes; and in an action for non-payment, the

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plaintiff can only recover their value; but if the promise, instead of being couched in words which are understood to mean current bank notes, expressly calls for them by name, the rule of decision must be much more applicable. It seems also to follow, that if a promise be to pay a given sum, in a particular currency, and that currency be depreciated at the time, proof can not be received that the whole sum was to be paid in specie, or currency not depreciated, because such proof would be, in effect, altering the contract and increasing the value of the money, by requiring something of greater value than that which was stipulated. In short, it follows that the true measure of damage, in all such cases, is the value of the notes or currency mentioned in the contract.

In the case of *McMinns v. Owens*, 2 Dall. 173, the covenant was dated in January, 1779, and required the defendant to pay two hundred and fifty pounds immediately, and two hundred and fifty pounds in annual installments. The contract contained no description of the kind of money. The principal question was, whether it should be reduced by the scale of depreciation, or paid in gold and silver. The court admitted testimony to prove that at the time of the contract it was agreed that the installments should be paid in whatever money was current, at the time they became due, on the ground that as there were two kinds of money in circulation (paper and specie), and the parties had not distinguished which they meant, there was a latent ambiguity. They distinguished it from the former cases, in which the contracts specified current money, which was understood to be paper money.

The doctrine established by this case is, that if a contract be for a given sum, without describing the kind of money or currency, and there are two or more kinds of money or currency, varying in value, either party may prove which was intended; but if the contract designates the currency, such evidence is inadmissible, because the plaintiff must receive the kind of money or currency designated, or its value.

In *Kaef v. Whitmer*, cited by Shippen, Justice, the cause was sent to auditors, after a judgment by default, to ascertain the value or kind of money. Such a course would not have been pursued, if the court had recognized the rule which is set up [221 in this case, because whether the currency was described or not, or whatever might have been its value, judgment would have been

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given for the sum named in the contract, which must have superseded the necessity of such a reference; but as the reference was made, the inference is irresistible that the amount of the recovery depended on the kind and value of the currency stated in the contract.

In *Pleasants v. Pemberton*, 2 Dall. 196, a receipt had been given in evidence for four thousand continental dollars, dated February, 1780, while continental money was a tender, but depreciated fifty for one. Parol proof was offered, that at the time of payment it had been agreed that the value of continental money should be adjusted afterward, and credit given accordingly. The testimony was opposed on the ground that it went to invalidate the receipt, and add to it a condition which would take off forty-nine fiftieths of its operation. The chief justice admitted the testimony, observing that it did not contradict the writing, or deny anything contained in it, although it reduced the credit from four thousand dollars, the nominal sum mentioned in the receipt, to about eighty dollars, the true value of that sum.

It is true that in these cases the recovery was graduated by a scale of depreciation established by the legislature, which the court was bound to observe; but that fact does not alter the principle or affect the equity of the rule. The only difference produced by it is that in those cases a rule of damage or of recovery was fixed by statute for the government of every case, which here is to be ascertained by testimony, under the direction of the court, in each particular case. The legislature of Pennsylvania did not establish a scale of depreciation, because it was necessary to enable their courts to construe contracts according to the intention of the parties, and to determine the meaning of terms by the usage of the country, but for the purpose of producing uniformity throughout the state. If no such law had been passed, the courts would have adopted the same rule of evidence and a similar standard of damage, and would have resorted to parol proof of the usage of the neighborhood, in place of the scale of depreciation. The statute, therefore, merely anticipated the courts, by providing a uniform rule, which was varied from time to time, and which dispensed with the necessity of parol proof. Nor should it be forgotten that the money in question was issued by Congress, and received its sanction from them, not from the state. The legisla-

222] ture, therefore, could not exercise any \*power, in relation

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to its value, in the construction of contracts, that the courts could not have done without their sanction. This conclusion will be manifest from a careful attention to the cases of *McMinns v. Owens*, and *Wheaton v. Morris*, before cited. In the former the contract contained no description of money, and therefore did not point to the scale of depreciation, and yet parol testimony was admitted to show the understanding of the parties. In the latter case the court authorized the jury to lay aside the scale of depreciation, and find the value of the property at the time of the contract, which the statute did not authorize, and which can only be justified on common law principles.

But whether the case before us be considered on precedent or on principle, we are brought to the same conclusion. It is manifest that the claim to the extent set up is against conscience, and, if sustained, will be a palpable fraud on the defendant. Assumpsit is an equitable action. It is declared by Lord Mansfield to be as broad as a bill in chancery; and it is said to be a general description of all cases in which it lies, that the defendant is bound by the ties of natural justice and equity to render what the plaintiff has a legal right to demand. Great latitude is therefore given to defendants, who are permitted to avail themselves of everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or any part of it. Although this doctrine might have been applied, by Lord Mansfield, most strongly to his favorite count for money had and received, yet a large portion of the same liberality is applied to the action of assumpsit generally, and especially if there be a money count to which, as in this case, all the plaintiff's testimony may be applied.

It is believed no person will contend that, on equitable principles, a party should recover more than he asked or expected by his contract, or more than he knew the defendant calculated to pay or intended to promise. Equity and good conscience forbid such recoveries, but they can not be avoided, if testimony like that now in question be rejected, and the plaintiff's construction of the note prevail.

On no principle of equity or common honesty can a man receive that which was never claimed or expected by him, or intended to be promised to him; and every sound maxim in morals, and every just conclusion of reason, which constitute the essence both of equity and law, justify any safe course calculated to pre-



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vent such unrighteous results. The plaintiff shows a promise for 223] two thousand dollars of \*current bank notes of Cincinnati, and demands for them the same sum in specie. It is matter of public history, known to the court, the parties, and the community at large, that these notes, when promised, were greatly depreciated, and if the allegations of the defendant be true (and for the purpose of deciding on the admissibility of the evidence we must presume them true), the demand is for six or seven hundred dollars more than the value of the bank notes, or of the property for which they were to be paid. The defendant contends that he ought not to pay more than the value of the notes promised, and, to protect himself against a further claim, offers to prove these facts, and also what was the understanding of the parties and the real design of the contract, or, in other words, how much in equity and good conscience the plaintiff ought to recover.

The authority of adjudged cases, as far as they are applicable, seem to favor the admission of the testimony. They allow proof of the intention of the parties, when it does not change or contradict the contract. They permit parol testimony to explain latent ambiguities, and to prove the value of articles, for the non-delivery of which damages are sought.

It appears to me that the main question, in this case, is one that is recognized in the practice of almost every term. When stripped of the apparent novelty and mystery that has been thrown about it, it resolves itself into this simple inquiry: May the parties resort to the common understanding and practice of the neighborhood or state in which a contract is made, to ascertain the correct meaning of any particular phrase about which they differ, and may the history of that district or state be referred to for the same purpose? This, in substance, is what the defendant claims. A promise is made to pay a given amount in a particular description of depreciated paper. The parties differ as to the legal import, or (what is the same thing) as to the true meaning of the terms they have used, and as one mean of solving the difficulty, it is proposed to resort to the general practice and understanding of those who have been in the constant habit of making similar contracts in the same neighborhood.

The case of *Kimball v. Noble*, decided in this court, was on an engagement to transport certain property from New Orleans to

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Cincinnati, and to deliver it in good order, *the dangers of the river only excepted*. The boat on her passage took fire accidentally, and was consumed with her cargo. The court having determined that the common law, in relation to carriers, which renders them liable for \*all losses not occasioned by the act of God, or the [224 public enemy, had not been adopted in this state, permitted the defendant to prove, what was generally understood among those engaged in the river trade, by the phrase *dangers of the river*, and on the explanation given by the witnesses the defendant had a verdict.

"When words used in a contract have different significations in different places, they will take effect as they are understood where they are spoken." 1 Pow. on Cont. 376. And in the same book, 407, "If money is to be paid by reason of a contract, the terms shall be understood and accepted according to their import, where it is to be received; that is, it shall be paid in currency there." In 1 Forb. 419, "Words should be expounded fairly, in the common sense that the words bore, *in the place and at the time*" *they were used*. It will be observed that the author is treating here of such rules as belong to the municipal law, in cases where chancery follows the law. If these passages have any meaning, they establish the right of giving parol testimony, to prove the signification of words used in a contract, in the place where the contract is made, and to show the *currency of that place*, by which I understand *its value* in comparison with any other description of currency. But of what use is such testimony, unless it be to ascertain the rule of damage, or the amount to be recovered? I can not discover any other object for which it can be required. If it be not to ascertain the value or amount of the currency spoken of, when reduced or raised to the kind of money or currency in which the court is to render its judgment, it would be wholly irrelevant.

In *Cole v. Wendell*, 8 Johns. 116, parol evidence was admitted to explain a written contract, by showing whether five cent. advance, stipulated to be paid, was to be calculated on the sum paid in on each share only, or on the nominal amount of the shares. In 8 Term, 379, parol testimony was admitted, to explain an agreement that appeared to be equivocal on the face of it.

In *McInstry v. Pearsell*, 3 Johns. 319, it was determined that a receipt was open to that kind of explanation, not directly contra-

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dictory to, but consistent with it, and that parol testimony was necessary, as far as the receipt itself was equivocal.

In *Noble v. Kerrsway*, Doug. 510, which was an action on a policy of insurance, on a voyage to the coast of Labrador, it was objected by the defendant, that there had been an unnecessary delay in unloading the cargo, in consequence of which he was not liable by the terms of the policy. Lord Mansfield permitted the 225] plaintiff to prove *\*the custom of the same trade at Newfoundland*, to show the true import of the policy, and the consequent liability of the defendant; and on a motion for a new trial, the court held that the testimony was properly admitted.

In 1 *Caine*, 43, we find that *contracts may be explained by commercial usage*, if the usage be proved to have existed a sufficient length of time to become generally known, and to warrant a presumption that the contract was made in reference to it.

The case of *Parr v. Anderson*, 6 East, 202, was on a policy of insurance. The difficulty arose on the construction of certain words used in the policy. The court held it material to ascertain, as a question of fact, in what manner *the parties to contracts containing the same form of words, had acted on them in former instances; and whether they had obtained in use and practice any, and what, known and definite import; and for that purpose they ordered a second trial.*

In the case of *Flowers v. Sproule*, 2 Marsh. 58, Judge Rowan in delivering the opinion of the court, when speaking on the construction of contracts, says, the question should be determined by reference to the intention of the parties, and that intention should be ascertained, as well from the subject matter of the contract, the conduct of the parties relative thereto, and other extraneous circumstances, as from the face and import of the writing.

In the case of *Doe v. Burt*, 1 Term, 701, the plaintiff was permitted to give parol evidence of facts, relating to the premises described in a lease, for the purpose of proving the intention of the parties; and on a motion for a new trial, the court were unanimously of opinion that the testimony was properly admitted. They observed, that the objection was against the justice of the case, and that it might be necessary to put a different construction on leases made in different places.

In the case of *Scott v. Bourdillion*, 5 Bos. & Pul. 213, evi-  
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dence of usage was admitted, to show that rice was not corn, within the meaning of the memorandum.

In the case of *Sleight v. Rhineland*, 1 Johns. 192; 2 Johns. 531, parol evidence was admitted to explain what was a sea letter, as used in the warranty.

In the case of *Coit v. The Commercial Insurance Company*, the question was, whether usage was admissible to control the ordinary and popular sense of a term used in the contract. The court say, "The law has been too long settled to be now questioned; that if any terms in a policy, have, by the known usage of trade, or *by use and \*practice*, as between assurers and [226 assured, *acquired an appropriate sense, they shall be construed according to that sense and meaning*. This is not only the modern rule, as to mercantile instruments in general, but it appears to have been the established practice, as far back as the time of Ch. T. Rolle and of Lord Holt, and although Lord Eldon regretted the rule, yet he admitted that it was too late to question its force. To reject this testimony now, would produce the greatest injustice, for the contract must have been made and understood at the time by the parties, in reference to this mercantile and practical meaning of the terms employed." See 7 Johns. 390, and the cases there cited.

The case of *Cutter, administratrix, v. Powell*, 6 Term Rep. 320, was assumpsit for work and labor done by the intestate. The defendant had given a note to the intestate, promising to pay him a certain sum, provided he proceeded, continued, and did his duty, as second mate, from Kingston to the port of Liverpool. The intestate died before the ship reached Liverpool, and the question was, whether the plaintiff could recover. Lord Kenyon was of opinion that she could not by the terms of the contract; but observed, that if the court were assured that those notes were in universal use, and that the commercial world had received and acted on them in a different sense, he would give up his own opinion. Mr. Justice Lawrence said, if we are to determine this case according to the terms of the instrument alone, the plaintiff is not entitled to recover, because it is an entire contract; but if the plaintiff could have proved *any usage*, that persons in the situation of this mate are entitled to wages in proportion to the time they serve, the plaintiff might have recovered according to that usage.

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These authorities seem to authorize the defendant to show, that in the general estimation and understanding of that part of the country in which this note was given, as well as by the express intention of the parties themselves, the terms made use of import a promise to pay two thousand numerical dollars of the paper described, or its equivalent in specie, and not so much of the paper as shall be worth two thousand specie dollars, and in default of such payment, an equal amount in specie.

The general rules laid down by elementary writers, for the construction of contracts, seem to lead to the same result. One of these rules is, "that anything which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made." Another rule is, 227] that "usage \*is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses, although they are not expressed." A third rule is, "that however general the testimony be, in which an agreement is conceived, it only comprises those things respecting which, it appears, the contracting parties proposed to contract, and not others which they never thought of." In the case before us, it is absolutely certain that the thing about which the parties proposed to contract, and did contract, was a depreciated paper currency. A fourth rule is, "that we ought to examine what was the common intention of the contracting parties, rather than the grammatical sense of the terms." For these rules, see 2 Com. on Con. 533.

In this case, the common intention, that is, the intention of both parties, was the payment of two thousand numerical dollars of a depreciated currency, and not the payment of that sum in specie, whatever may be the grammatical sense of the terms they have used. It is a plain inference from these rules, that the law always regards the intention of the parties, and will apply these words to that which, in common presumption, may be supposed to be their intent; for if it were otherwise, the law would consist in form rather than in substance—the intention of parties would yield to grammatical construction, and contracts would be expounded and enforced in a way altogether variant from their original design.

A term or a phrase which has received a judicial interpretation, must be construed according to that interpretation, and can not be varied by reference to the usage of any particular place or kind

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of business. As for example this court, in the case of *Kimball v. Noble*, having settled the meaning of the phrase *dangers of the river*, when used in a contract for the freight of goods, by parol testimony of the understanding and usage of men engaged in that business, a party would not now, in a similar case, be permitted to question the interpretation, by proving a different usage. So, in the construction of deeds and wills, terms which have been decided to convey a particular estate, can not be varied in their meaning by testimony of usage or common understanding; but, as in the case before us, there has been no judicial interpretation of the terms used in this note, the door for admitting parol testimony is open, nor could it lead, as has been observed, to the establishment of different rules of decision, for different parts of the country. The rule would be uniform, though the effect of its application might be variant. Where the currency called for, was equal in value to the description of money \*for which the judgment of the court must be rendered, the [228 necessity of the evidence would be superseded, or, if admitted would produce no effect; but for all cases of depreciated currency, one rule would establish the measure of damage, as it does in property contracts. The idea, therefore, that different rules will be necessary, because the value of currency may vary at different places or at different periods, is not well founded.

I think I am correct in saying that no judicial decision has been made affecting the case before us. That many judgments have been rendered on similar notes is true, and probably the paper mentioned in some of them, might have been depreciated at the date of the note; but I do not know of any case in which the question was raised and decided by the court, except the cases which came before Judge McLean and myself, in 1822, where the testimony was admitted; but as it was understood that some of our brethren entertained a different opinion, the decision was not considered as settling the law.

According to my apprehension, the plain and obvious import of the terms used in this note would naturally lead to the same conclusion which the defendant proposes to confirm by the testimony offered, and that the principal use of the testimony is to show that the pretensions of the plaintiff are as consistent with the general understanding and usage of the country in similar cases, as it is with the literal meaning of the language used in the note.

I will here notice an argument which ought to have been con-

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sidered in an earlier part of this opinion. It is said that if the money had been paid when it became due, the plaintiff, instead of passing it off at its depreciated value, might have prosecuted the banks and compelled them to pay the nominal sum in specie. This is neither more nor less than an attempt to charge the defendant with the imaginary loss of a good bargain. It can not be presumed that the object of the plaintiff in selling his property, was to speculate in bank paper; but if it were, the result of the speculation, to say the least of it, was extremely doubtful. Had the paper been paid on the day, it is far more probable, from the failure of some of the banks and the known inability of others, that it would have perished in his hands, than that he could have realized the nominal amount in specie; but be this as it may, the law does not extend its views beyond the contract, it does not take into consideration the probable result of subsequent arrangements, which may be prosperous or disastrous. It does not regard the profitable use a 229] plaintiff might \*make of his money, as forming any part of the basis on which the rule of damage is founded. Hence the indorsee receives from his indorser the consideration paid, and no more, although it be less than the amount of the note or bill.

In this, as in other cases, the use to which the money might have been applied, and the result of the application, are not known to the court, nor is it regarded by the law.

The effect of such a principle, when reduced to practice, will be seen in a moment. If it be admitted at all, it must extend to property contracts, and lead to an inquiry into the profits that might possibly have resulted from a sale of the property contracted for, had it been delivered agreeably to contract. I can not perceive any difference, in principle, between the probable advantage that might have resulted from the possession of the bank paper, in this case, and that which might result from the delivery of property, or even the punctual payment of money, in any other. In either case a good bargain or speculation might be lost.

The principle adopted by my brethren necessarily leads to this inconvenience, that wherever a state is so unfortunate as to have its circulating medium consist of depreciated paper, as was the case with us when the note in question was given, and is now the case in at least one of our sister states, no contract can be made, with safety, predicated on the value of that medium. Experience teaches that the price of property is in proportion to the quantity and value of

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the circulating medium. When that is abundant and greatly depreciated, property acquires a fictitious value, which purchasers, however, may be willing and can afford to pay in the currency in which they are dealing; but it would be ruin to purchase on credit, for should accident or misfortune prevent a punctual payment, or should the paper entirely sink, or by other means be withdrawn from circulation, although this change may have reduced the price of property fifty or a hundred per cent., they must nevertheless pay the nominal sum in specie, equally regardless of the understanding of the parties and of the terms used in the contract. To such a rule of decision I can not yield my assent, however unpleasant it may be to differ from my brethren.

If the testimony had been admitted, it would have been necessary to determine the period to which it should apply. The rule as to property contracts, that damages shall be assessed with reference to the time of delivery, was arbitrary, and was adopted as much from the necessity of having some rule on the subject, as from the equity of that particular rule.

\*The class to which the case before us belongs, has a strong [230] resemblance to property contracts, but there are some points of difference that deserve consideration, and seem to require a variation in the rule. In property contracts, the parties are in the habit of estimating the probable value of the article at the time it is to be delivered, and govern themselves accordingly; but in the sale of property for current bank paper, they consider it as a species of money, and determine on the sum to be paid by a reference to its depreciation, compared with specie, at the time of the contract. If the price was set in specie and the payment agreed to be made in currency, an additional sum was charged equal to the depreciation; but when the price was set in currency, and the payment agreed to be in specie, a discount was made, equal to the difference in value, and these calculations were generally made with reference to the state of things at the time of the contract. They do not appear to have been considered as wagering contracts, nor does it seem to be good policy to place them on that footing. Property contracts are so considered, and great injustice is frequently done by unexpected changes in price, but not to the same extent, as would be the case in contracts like the present; because the variations in price can rarely be as great or as certain. Equity seems to require that the value should be taken at the date of the contract; because on that prin-



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eiple the seller will receive, and the purchaser will pay, the precise value originally designed. If, at the date of a currency contract the paper designated was passing at a discount of thirty per cent., the payee would gladly have received specie at a proportionate advance, and such was every day's practice. Currency contracts were invariably made, with reference to the value of currency, at the time of the contract; and if, at a subsequent period, the payee should recover either more or less than that value, injustice would be done, and the original intent of the parties would be frustrated.

It is believed that the application of the existing rule to cases like the present would have an unhappy effect on public morals; it would put it in the power of some to demand money for which they had given no value, and of others to withhold money for which they had received value. It would give a legal sanction to injustice, and weaken the obligation of the moral sense; it would produce an effect on society similar to that produced by lotteries and games of chance; it would, in short, habituate men to acts of injustice and extortion.

In the case of Wharton, the court left it discretionary with the jury to reduce the nominal amount by the scale of depreciation, or to find the value of the property and interest, on the day of sale, which was the date of the contract. The jury elected the latter, by which they must have given the same amount as would have been stipulated for, if the contract, in the first place, had been for specie. This was certainly equitable, and seems to be the rule which justice requires in the present case. It is also worthy of remark that, in that case, the counsel for the plaintiff put the case on the ground of a fair and lawful wager, depending on the appreciation or depreciation of the money on the day of payment. They contended that as paper money had entirely sunk, and was out of circulation, on the day of payment, they had a right to receive the nominal amount in the currency of that day, which was specie. The court, however, did not view it in the light of a wagering contract, and directed that the recovery should be for the value of the money described, or of the property sold, at the time of the contract.

Before I dismiss the subject, it is proper to state, that owing to circumstances not within the control of the court, I have not had

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an opportunity of perusing the opinion in this case; the consequence of which may be the omission of some points that ought to have been considered.

Judgment for the plaintiff, for two thousand dollars, with interest.†

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\*[*The following cases, decided upon the circuit, were not received by the Reporter in time to be inserted in their proper place.*] [232]

TAYLOR AND MORGAN v. GALLOWAY AND OTHERS.

Power given by will to executors to sell land may be executed by one executor, if one only accept the office under the will.

Such power does not authorize an exchange or barter of lands, but a sale for money only.

THIS was a bill in chancery, prosecuted in the common pleas of Greene county, and carried into the Supreme Court by appeal, where it was decided at May term, 1822, by Judges Pease and Burnet. The case, so far as it involved the points decided, is stated fully in the opinion of the court by Judge Burnet, and need not be repeated.

The opinion of the court, by Judge BURNET:

The decree that ought to be rendered in this case may be determined by the solution of two questions.

1. Was the acting executor, James Williams, authorized to sell

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†NOTE BY THE REPORTER.—See the case of *Hunt v. Rousmanier's Adm'r*, 8 Wheat. 174. In this case, the Supreme Court of the United States decided that where a party, through *mistake* and *ignorance of law*, executes a writing which does not carry into effect the contract and the intention of the parties, parol evidence may be received to establish the fact, and the true contract and real intention of the parties enforced in equity; and this where no fraud is alleged, nor no mistake in a matter of fact, but a mistake in point of law only, the legal effect and operation of the writing not being such as the parties intended.

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the land without the concurrence of William Edmonds, who was named in the will as a co-executor?

2. If he was, has he made such a sale to the complainant, Taylor, as is authorized by the will?

The authority given by the will is in the following words: "*All the rest of my estate I leave to be sold, as my executors hereafter named, shall think best; and the moneys arising from such sale, I give unto my infant daughter, Susanna Eliza Green, to her and her heirs forever.*"

William Edmonds and James Williams were constituted executors. Williams obtained probate, and undertook the duties of executor alone. Edmonds, who did not join in the probate, was afterward appointed guardian to the infant children.

The contract entered into by Williams, the acting executor, with the complainant, Taylor, authorized the latter to change the locations, to redeem such parts of the land as had been sold for taxes, and to do whatever might be necessary to secure the property and perfect the title; in consideration of which, Taylor was to have an equal moiety of the land.

The first question that arises, is, was Williams alone authorized to sell the land?

It is manifest that the will gives to the executors a naked power  
 233] \*not coupled with an interest. If land be devised to executors to be sold, or if it be devised to be sold by executors for the payment of debts, in either case the power is said to be coupled with an interest, and the survivor may execute the trust, because the act of God shall not prejudice; but if one of the executors refuse to act (the devise being to them by name), the other, it would seem, at common law, can not sell, because it is a joint confidence and must be jointly exercised. This principle has been changed by 21 H. 8, which authorizes a sale by those who consent to act. Swinb. Wills, 406-408.

If land be devised to be sold by executors, this is a naked authority, not coupled with an interest, and can not be executed by a survivor. Swinb. on Wills, 407. If the devise be, that the land be sold by the executors, not naming them, although the power be not coupled with an interest, it seems that it shall survive; because the power being to the executors generally, those who execute the will are legally the executors, and, therefore, may execute

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all the powers given to the executors as such. Co. Lit. 112, 113; Cro. Eliz. 26.

But if a devise be that A. and B., who are constituted executors, sell the land, although they may legally sell without taking on themselves the duty of executing the will, yet if one should die, the survivor can not act, because the power must be pursued strictly, and it being given to two jointly, it is determined by the death of one of them. The case of Bonefant, Cro. Eliz. 80, contains a different principle, but that case does not seem to be supported by the authorities.

In the case before us, the devise is that the executors may sell. Williams, therefore, having proved the will, and taken on himself the office of executor, was thereby vested with all the power given to the executors as such, and consequently had a right to make the sale.

But the most important question is, whether the contract made with the complainant, Taylor, be such a sale as was contemplated or authorized by the will.

The manifest design of the testator was to convert the whole of his estate into money, for the benefit of his infant daughter. The trustees are not authorized to exchange or incumber the land or to dispose of any part of it, to perfect a title to the residue. The power is to sell, and the sale must be for money.

It may be said that the contract with Taylor was a sale, and that he is a purchaser for a valuable consideration. This is technically true, as it would have been if the executor had conveyed to him a moiety of the land as a reward for effecting a sale [234 of the other moiety. But it is presumed that such a sale would not be valid, as it would defeat the object of the testator.

The power must be strictly pursued, and must be executed according to the manifest intent of the testator.

If the trustee could incumber the estate, by granting an equitable claim to an undivided moiety, for the purpose of procuring a removal of the entries and a completion of the title to the residue, he might, on the same principle, exchange it for land in Virginia, and give a moiety of it to the agent who should negotiate the exchange.

The trust delegated by the will is personal, and can not be transferred. As Williams voluntarily took on himself the office of trustee, it was his duty to execute the trust in person, and to do

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Anonymous.

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everything that might be necessary to enable him to do so. He certainly had no right to give away any part of the land, to procure a third person to perform services that he was bound to perform himself. If such a discretion exist, it is impossible to say how far it extends, or by what rule it shall be limited. It would vest in the trustee the same power, and the same control over the property, that the testator had in his life. This difficulty can be obviated only by holding the executor to a strict execution of the power, which was, in the present case, to sell the land for money, and at a fair price. As the contract on which the bill is founded, was not such a sale, we feel bound to say that it was not authorized by the will, and that it vested no right in the complainant. The circumstance, that the guardian joined in the contract, can not alter the case, as he certainly had no power to sell the real estate of his ward.

It being ascertained that the complainant acquired no title, either legal or equitable, to the land in question, by the contract under which he claims, it is unnecessary to look into the title of the defendants.

Bill dismissed.

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\*ANONYMOUS.

Bill in equity to foreclose the equity of redemption in mortgaged premises may be sustained, notwithstanding the statutory legal remedy by *scire facias*.

Upon such bill the mortgaged premises must be valued, agreeably to the provisions of the law regulating judgments and executions, and the court will direct a sale, and not a foreclosure, if two-thirds of the valuation amounts to more than the debt.

Such sale will be directed on the same principles that real estate is sold, under the act regulating judgments and executions.

A WRIT of error was allowed by Judge McLean to remove the record of a final decree, rendered by the court of common pleas in Huron county, on a bill to foreclose an equity of redemption. The principal errors assigned were: 1. That such a bill could not be sustained, because there was an adequate remedy at law, under the act providing for the recovery of money secured by

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 Smith v. Parsons.
 

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mortgage. 2. That the court below had directed the mortgaged premises to be sold without valuation.

The cause having been argued by counsel, in Huron county, was taken under advisement, and submitted to the court in Trumbull county, at the term in 1821, all the judges being present.

After mature consideration, the following points were unanimously decided: 1. That the court may sustain bills of this description, notwithstanding the statute allowing proceedings by *scire facias*. 2. That in every such case the laws of the state require that the mortgaged premises be appraised, and that they be not sold at less than two-thirds of the appraised value.

For the regulation of the practice in similar cases, the court established the following rule: That no final decree be entered on a bill to foreclose an equity of redemption or to effect a sale of a mortgaged premises, until the court shall have caused an appraisement to be made agreeably to the provision of the act regulating judgments and executions; and that if, on the return of the appraisement, it shall appear that the premises, at two-thirds of the valuation, do not exceed the sum due on the mortgage, the court may decree a foreclosure; but if the mortgaged premises, estimated at two-thirds of the appraisement, shall exceed the amount due on the mortgage, and a decree be rendered for the complainant, a sale shall be directed on the principles of the act regulating judgments and executions.

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State insolvent laws discharging debtors from the debt upon surrendering up all their property, valid as to contracts made between citizens of the same state within its jurisdiction after the law was enacted and in force.

THIS cause was decided by Judges Pease, Hitchcock, and Burnet, in Ross county, November, 1822. The whole case is fully stated in the opinion of the court, by Judge Burnet.

Opinion of the court, by Judge BURNET:

This cause is presented for the opinion of the court, on the following agreed case:

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"The suit is brought on promissory notes, executed by defendant when a resident and citizen of the State of Maryland. The defendant pleads his discharge under the bankrupt law of that state. At the time the notes were executed, both plaintiff and defendant were citizens of Maryland. The bankrupt laws were enacted prior to the execution of the notes. The defendant is a regular certificated bankrupt, or insolvent, under the laws of Maryland, which are a full discharge of all debts returned. This debt was returned. All defendant's property was duly assigned to trustees in Maryland."

Before an attempt is made to investigate the principles presented by this case, it is necessary to state that this court recognizes the constitutional right of the Supreme Court of the United States to expound the constitution, and to settle its import, wherever a doubt arises; and that it is our duty implicitly to receive their construction as a rule of decision, in all cases in which it applies. That tribunal having decided that a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts within the meaning of the constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law, our inquiry may be limited to the single question, whether the law of Maryland did or did not, in the sense of the constitution, impair the obligation of the contract on which the present suit is founded.

This case is clearly distinguishable from that of *Sturges v. Crowninshield*, and can not be considered as determined by it. In that case, the notes were given prior to the passage of the law. In this case, the law was in force at the time the notes were executed. By that case it was decided that a legislative act can not affect a [237] contract \*made before its execution, so as to discharge a party from its obligation, which would have been the consequence had the plea been sustained. In this case it is to be decided whether a law in force at the time of the execution of a contract, can operate on that contract, so as to relieve a party from the performance of its stipulations. The case of *McMillan v. McNeil* is confidently relied on as settling this question; but that case appears to be as clearly distinguishable from this as the case of *Sturges v. Crowninshield*, as will appear by a comparison of facts. In that case the parties were both residents of the State of South Carolina, where the cause of action arose. There was no bankrupt

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law in force in that state. The defendant, Mr. McMillan, removed to Louisiana, where he obtained the benefit of the *cessio bonorum*. He had also obtained a certificate under the bankrupt law of England; and, being sued in the District Court for the District of Louisiana, pleaded those certificates in bar of the action. The contract was made under the laws of one state; the discharge was obtained under the laws of a different state. The law of South Carolina governed the contract—the laws of Great Britain and of Louisiana were relied on to discharge it. In the present case, the parties were residents of Maryland; the contract was made, and the certificate was obtained, under a law of that state, in force before and at the date of the contract. From this comparison, it appears that the cases are distinguishable in several important facts. Yet if it were clearly discernible, that the Supreme Court intended to embrace within the scope of their opinion, a case situate precisely like the present, this court would receive it as their guide; they would not feel themselves at liberty to investigate its correctness, or to question its authority, but would at once render judgment in favor of the plaintiff. But such does not appear, from the opinion delivered by the chief justice, to have been their intention. He decides “that the case was not distinguishable in principle from the preceding case of *Sturges v. Crowninshield*; that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle.” The reason is not stated, but we can be at no loss to discover it. A law of Louisiana, or a statute of Great Britain, could have no influence on a contract made in Charleston, under the laws of South Carolina. The parties can not be presumed to have had a knowledge of their existence, much less to have agreed that they should form a rule for the construction and government of their contract. \*They could not, [238 therefore, under any circumstances, affect it, or the rights of the parties under it; and consequently it made no difference whether they were passed before or after the contract, for in neither case could they influence it. Well, then, might it be said that the circumstances of the law having been passed before the debt was contracted, made no difference. This is understood as applying strictly to the case then before the court; and being so applied, who can question its correctness? If the law, under no circum-



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stances could bear on the contract, the fact of its prior existence could give it no other or greater force than would be ascribed to it, had it been enacted after the date of the contracts; and consequently, the distinguishing fact relied on in this case, could not in that case make a difference in the application of the principle.

From this view of the subject, the question presented in the case before us seems to be open, and the court at liberty to examine and decide what effect the bankrupt law of Maryland has on the notes on which the present suit is brought.

As was observed in the argument, contracts are either expressed or implied, or part expressed and part implied. A provision created by law for the government or construction of all contracts made under it, need not be recited or expressly referred to in a contract; it will be considered as implied, and have the same force and effect as if it were set out. Should a contract contain a clause, declaring it null and void on the happening of a particular event, as the insolvency of either party, would such a clause be void, or would it be considered as impairing the obligation of the contract? If not, would the same provision in a law, made applicable to all subsequent contracts, so as to form a part of them, be considered as impairing their obligation? It is believed not. Many cases might be cited in which the law forms a material part of the contract, although neither recited nor even referred to; as when one person engages to labor for another, without a promise or stipulation of payment. If payment be refused and suit be brought, courts do not hesitate to say that by the law in force when the engagement was made, the laborer was entitled to the value of his labor—that the contract must be construed by the law—that the law must be taken as forming a part of the contract—and, therefore, that the plaintiff shall recover. In such a case, the obligation to pay is entirely created by the law, and the recovery is had on the ground that the law forms a part of the contract; for on no other principle would the defendant be held liable.

Although a state legislature can not pass laws impairing contracts, yet they may regulate them, prescribe their form, their effect, and the mode of their discharge, and every contract is supposed to be made with reference to those laws. Thus if a contract be made for the payment of money, without designating the time of payment, the law says it shall be payable on demand. It fixes the day of payment, but is silent on the subject of in-

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terest, interest shall attach from the day the money becomes due. In these, and in many other cases, the obligation is created by law. In other instances it is discharged by law; as, if a contract be, in whole or in part, contrary to a statute, it is void *in toto*. If the condition of a bond becomes impossible, by the act of God, by the act of the party, or by operation of law, the bond is void. If a contract be founded in usury, or given for a gambling consideration, or for a consideration *malum in se*, or if it be contrary to good policy, it is void. In all these cases, the intention of the parties is controlled and restrained by the law; yet it is not considered that the contracts are unconstitutionally impaired. On the same principles, may not the bankrupt law of Maryland be considered as controlling the obligation of the contract on which the present suit is founded.

It is admitted that the states have not given up the entire power of legislating on the subject of contracts. They may, for instance, pass laws preventing usury, and fixing the interest of money. Should such a law enact that a lender may receive from a borrower six per cent. interest and no more, and should an after contract contain an express promise to pay ten per cent., such contract, although voluntarily made for the payment of a specific sum, would be void in part, and, in many of the states, the obligation of the contract would be entirely destroyed, and the obligor released from the payment of both principal and interest. Independent of statute law, every person has the same right to contract for ten per cent. interest, that he has for the payment of the principal sum; and if the law limiting interest at six per cent., can absolve him from the payment of the excess, and even of the principal itself, is not the obligation of the contract as clearly affected, as it is in the case before us? It is admitted that such a law, applied to contracts made prior to its enactment, would be unconstitutional; but not so when applied to subsequent contracts. Why, it may be asked, does this distinction exist, and why is not this class of laws considered void on constitutional grounds? They evidently affect contracts voluntarily made on subjects about which the parties had a right to contract. One reason only can be assigned. The legislature has a right, by law, \*to regu- [240] late contracts, to determine their effect, and point out the mode of their discharge. These laws are applied to all subsequent engagements, and fix the rights of the parties at the very instant the

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contract is closed, so that the contract, in its inception, receives an impress from the law, and the effect of the law being co-existent with the contract, can never be said to alter or impair it. It continues what it was at its commencement; and it is more correct to say that the law has in part made the contract, than that it has changed it. If an obligor be entirely discharged from a contract, by the operation of a statute against usury, and the constitution be not violated, it would be difficult to assign a reason why that instrument should be violated by a bankrupt law acting prospectively and pointing out a state of things, on the happening of which a contract shall cease to have effect, or shall be considered as discharged. If, however, an attempt should be made to give these laws a retrospective effect, the constitutional objection would arise in all its force; for although the legislature may regulate contracts to be made in future, it can not disturb those previously made, or unsettle rights previously vested; and this is the distinction that ought to determine the character of the law of Maryland. On any other view of the question, the power of the states to legislate on the subject of contracts will be materially impaired; for if it be admitted that a bankrupt law, operating on an after made contract in the manner prescribed and as was understood by the parties, be unconstitutional, or if contracts be not made with reference to existing laws, so as to imply an assent to their provisions, it must follow that statutes of limitation, statutes against usury, gambling, sale of offices, frauds, and perjuries, and the like, must be void, because they impair the obligation of contracts not prohibited by the constitution, and which would have been legally binding had not those statutes been made.

It can not be said that bankrupt laws go further than the statute just mentioned. They require all contracts to contain, by implication at least, a condition that they shall be discharged on the happening of a particular contingency, which would not have affected the contract had there been no statute on the subject. The Supreme Court of the United States decided that the states may legislate on the subject of contracts. They originally possessed that power, and have conferred it on the general government only in part. They, therefore, possess a concurrent power, and may exercise it as freely as the general government. They may pass a bankrupt law, with this qualification, that so far as it conflicts with

241] \*an act of Congress to establish a uniform system of bank-

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ruptcy, it must yield. But the general government having no law on the subject, there appears to be no restraint on the states. By a power derived from the people, Congress may establish a uniform system of bankruptcy throughout the United States. The states, by a power also derived from the people, may pass bankrupt laws (qualified as above), operating within their respective territories. These powers being received from the same source, and differing only in the extent and limits of their operation, would be considered, at first view, as conferring on each equal rights; and it is the opinion of some intelligent jurists, that when Congress have no law on the subject, the states may legislate to the same extent that Congress have a right to do. But as we only claim for the states the power of discharging, by the operation of their bankrupt laws, contracts entered into subsequently to their passage, and within the state in which the law has effect, and admit that if those laws were applied to pre-existing contracts, or to contracts made in a different state, they would impair their obligation. It is not within our province to examine that opinion.

It is asked if a law releasing a contracting party from the performance of his stipulation be not a law impairing the obligation of contracts, what is the definition of such a law? It may be answered, when a law by which the parties to a contract are not bound, or which can not be considered as forming a part of the contract, or as creating a rule for its construction, is applied in its discharge, it may be said to impair its obligation in the sense of the constitution.

It was contended by counsel that, although the contract between these parties was made with a knowledge of the law of Maryland, it was also made with a knowledge that the law was unconstitutional, and that the contract could not be affected by it. This is drawing a conclusion from premises that take for granted the point in controversy. It is arguing from the contract to the law, and determining the validity of the latter by the apparent intention of the former. When the law in question was enacted, it interfered with no contract, every contract then in existence being placed beyond its operation. As to them, therefore, it was unobjectionable. It had no operation on them prohibited by the constitution. Consequently, persons then about to contract could not know the law as one impairing the obligation of contracts in the

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sense of the constitution, but as an act regulating future contracts, and pointing out a mode by which they might be discharged. If 242] the law, at its inception, \*had no improper bearing on contracts, and was free from constitutional objections, the parties to an after contract could not change its nature, and convert it into an unconstitutional act. This would be enabling them to give a new character to an existing statute, and virtually to contract away the power of the legislature. Contracts can not change the character of laws; they are subordinate to them. Instead of determining the validity of the statute by reference to the alleged intention of the parties to the notes in question, we must fix the legal intent of the parties, as well as the nature and extent of the obligation of the notes, by a reference to the statutes. The statute must be tested by the constitution applied to it at the moment it took effect, and with reference to the operation it then might have on rights vested by existing contracts, and if it be found then free from constitutional objection, parties about to contract can not know it to be unconstitutional.

In the case of *Melon v. Fitzjames*, 1 Bos. & Pul. 142, in which it was determined that a contract made in France should be construed by the laws of that country, and that the defendant was not bound by the mere words of the contract, but might show how it would be considered in France, Justice Rooke says: "*If the law of France has said that a person shall not be liable on such a contract, it is the same as if the law of France had been inserted in the contract.*" The plain import of this language is, that contracts must be expounded according to the laws in force at the time they were made; and that the parties are as much bound by a provision contained in a law, as if that provision had been inserted in, and formed a part of the contract.

On the whole, from the view now taken of the subject, we are led to conclude that the case before us differs materially from the cases of *Sturgis v. Crowninshield* and *McMillan v. McNeil*, and that it can not be considered as settled by their authority—that this court, therefore, must decide it according to their own construction of the constitution. That the statute of Maryland, being confined in its operation to after contracts made within that state, does not interfere with the constitution, and that the defendant was, by the operation of that statute, discharged from the payment of the notes on which the present suit is founded.

## \*LESSEE OF ZIBA LINDSLEY v. ARTHUR COATS. [243]

*Decided at Columbus, by all the Judges.*

Legal title to real estate could not be acquired by parol before the statute of frauds.

THIS was an action of ejectment, tried before the Supreme Court, in Athens county, 1823, upon an appeal by the defendant from a verdict and judgment rendered against him in the common pleas.

The facts of the case were these: The defendant, and one Timothy Wilkins, under whom the lessor of the plaintiff derived title, were owners of leases for ninety-nine years, renewable forever, of part of the college lands, in Athens county. In the year 1807, the defendant, Coats, and Timothy Wilkins, agreed by parol to exchange the lands they owned, and each gave up to the other possession according to the agreement. Coats had remained in possession of the premises thus obtained by exchange, which are the same for which the suit is brought, ever since. It was part of the contract that deeds should be executed between them, but it was never done. Upon the trial, in the Supreme Court sitting in Athens county, the plaintiff relied upon the legal title. The defendant gave evidence of the contract of exchange, and the possession acquired under it. The court, Judges Pease and Sherman, charged the jury that the agreement by parol, and the possession acquired under it, could not be set up at law to defeat the legal title of the plaintiff. A verdict was found for the plaintiff. The defendant moved for a new trial, upon the ground of jurisdiction, and this motion was reserved for decision by all the judges.

Ewing, in support of the motion:

At common law an exchange, without livery of seizin, transferred real estate when the lands lay in the same county, and such exchange, *by parol*, was good. Littleton, sec. 62-65, and Coke thereon, C. L. 50, 51; and see Shepherd's Touchstone, title Exchange. This mode of exchange was done away in Eng-

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land by the statute of frauds, 29 Charles II., 63 Hargraves' Notes, N. 126.

No English statutory provisions have ever been of force in this state or territory, except by the provisions of the territorial law of 1795, which adopts the common law of England and the statute made in aid thereof to the 4th of James I.—no farther. Until long after that time a parol exchange was good in England.

244] \*The law, in that respect, is in nowise affected by the ordinance of Congress, which was temporary in its provision, and, in that particular, to exist only until the governor and judges should adopt laws. 8 Stat. Laws, 619. The law of 1805, vol. 8, p. 398, which provides for the execution and acknowledgment of deeds, does not declare, nor can it be inferred from its provisions, that lands shall not be conveyed otherwise than by deed. If it do, it defeats, at least, our other common law estate (that by curtesy), which, I believe, is not recognized in any of our previous statutes. It may be said that the mode of transferring real property by parol is not suited to our state of society. This is true, and was a good reason for legislative interference, but could not, without that interference, alter the rule of law.

No argument was presented on the other side.

By the Court :

The lessor of the plaintiff produced a regular title to the lands in controversy, from the university at Athens, under whom the same was held.

The defendant gave evidence, that in the year 1807 (anterior to the enactment of the statute of frauds), an agreement by parol was entered into by him and one Timothy Wilkins, the then owner of the lands in dispute, and through whom the plaintiff deduces title to exchange the same for lands of the defendant, also held under the university, situate in the same county; and that each party to the contract went into possession of the lands so obtained by exchange. The court instructed the jury that the parol exchange accompanied with possession did not vest in the defendant the legal estate in the land. A new trial is sought for, on the ground that this direction was incorrect. It is contended by the defendant that, at common law, a parol exchange of lands situate in the same county, accompanied with possession, transfers the legal

estate without livery of seizin; and that at the time when this exchange was made, there was no statute law of the state requiring contract of or concerning lands to be in writing.

By the common law, a parol exchange of lands situate in the same county, was good, provided each party went into possession of the lands acquired by such exchange; but if the lands were situate in different counties, or either party died before going into possession, such parol exchange was void. Shep. Touch. 294; Lit., sec. 51, 52, 62. Nor was livery of seizin necessary to perfect such exchange, for each had already corporal possession of his land.

\*This was one of the ancient common law modes of trans- [245  
ferring real estate, adopted at a time when writing was practiced or understood but by few individuals.

It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as those principles are adapted to our circumstances, state of society, and form of government. In no instance have the ancient common law modes of conveyance, as such, been adopted in this state; and long anterior to the settlement of this country, they had given way to the comparatively modern mode of assurance by deeds of lease and release, bargain and sale, etc. There is nothing in our circumstances or state of society that would seem to require the adoption of a principle so pregnant with mischief as that the title to real estate might rest in and be evidenced by parol only.

The policy of all our laws respecting lands is opposed to such a principle. Without attempting to enumerate the different acts of the legislature applicable to this subject, it may be said that from the first organization of the government to the present time, it has been the policy of our laws that the title to real estate should be matter of record, subject to the inspection of every individual interested. The uniform custom of giving and receiving deeds upon all sales and transfers of real estate has been in accordance with this policy; and this is believed to be the first instance in which an attempt has been made to sustain a legal title to lands resting only in a parol contract.

The policy of law, the custom of our country, the danger of perjury, and the many inconveniences that must necessarily result from the establishment of the principle contended for by the defendant, would, in the absence of all legislative provision upon the



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subject, require us to declare that the exchange claimed by the defendant did not transfer to him the legal title to the land in controversy; and that no contract evidenced only by parol, though accompanied with possession or livery of seizin, would vest in the purchaser, a legal estate in, or legal title to lands.

The court, however, do not deem it necessary to determine this cause upon the principles of the common law, as applicable to our circumstances and state of society; as we are of opinion that at the time when the exchange relied on in this case took place, there were statutory provisions in force, regulating the conveyance of real estate.

The ordinance for the government of the territory of the United States, northwest of the river Ohio, passed July 13, 1787, after providing that the governor and judges shall adopt such laws of the original states as they may deem best suited to the circumstances of the district, subject to the approval of Congress, provides, "that until the governor and judges shall adopt laws, real estate may be conveyed by lease and release or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may lie, and attested by two witnesses."

The ordinance provides for the conveyance of real estates, and points out the manner in which such conveyances may be made by deed duly executed, thereby clearly excluding all parol conveyances of land, under whatever circumstances they may be made, or with whatever solemnities attended—*expressio unius est exclusio alterius*. It evidently was not the intention of Congress merely to legalize those modes of conveyance which are mentioned in the ordinance, leaving it at the option of owners of real estate within the territory, upon the sale of their lands, to convey the same either by the ancient common law mode of feoffment, with livery of seizin, or by deed duly executed; but to provide that every conventional transfer of real estate by vendor to vendee should be evidenced only by deed. And this opinion is strengthened by the provision of the ordinance that "personal property may be transferred by delivery," and by the clause saving to the French and Canadian inhabitants, in certain parts of the territory, "their laws and customs now in force among them, relative to the descent and conveyance of property."

The governor and judges, in 1795, executed the powers vested in them by the ordinance, and adopted a law directing the manner

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of executing, proving, and acknowledging deeds, as well as providing for recording them. In 1802 the territorial legislature made further provisions upon this subject, and gave effect to deeds for lands in the territory where such deeds were made out of the state, but executed and proved or acknowledged in the manner prescribed by the laws of the state where made, and recorded in the county where the land lies.

The provisions of these laws are substantially enacted in the act of 1805, which provides for the whole subject of executing, acknowledging, proving, and recording deeds, and directs, among other things, that the deed shall be recorded in the county where the land lies.

None of these acts provide, in express terms, that land shall only \*be conveyed by deed; but they are all evidently framed on [247 the hypothesis that real estate can not be transferred by parol. The latter act contains many provisions which can be neither literally nor substantially complied with, if a parol conveyance be effectual in law to vest a legal estate. Such (for example) is the provision that conveyances, whereby any lands, tenements, or hereditaments shall be affected in law or in any manner incumbered, shall be recorded. It is claimed that the exchange proved in this case, accompanied as it was with possession, amounts to a conveyance of the estate in the lands exchanged; and if it can have any legal effect, it must be as a conveyance of the estate, and, as such, must, by the positive enactment of the statute, be recorded. Yet it is, in its very nature, incapable of being recorded.

The care of the legislature, in providing in each county an officer for the recording of deeds of real estate, in providing for the formal execution of such deeds, and in requiring them to be acknowledged before some judicial officer, is idle and vain, if a mere parol conveyance, necessarily unaccompanied with these formalities, will vest in the purchaser a valid legal estate.

Admitting, then, as contended for by the defendant, that that part of the ordinance which points out the mode of conveying real estate, had ceased to be effectual by the act of the governor and judges of 1795, made *in pari materia*, being a substantial compliance with the provision which limits its duration to the time of the governor and judges' adopting of laws, yet its provisions are substantially re-enacted in the act of 1805, which was in force when this exchange of lands was made. The ordinance was the first of

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a series of legislative acts respecting the transfer of real estate, and its provisions, with little variation, have been incorporated into all subsequent statutes. We are satisfied that, upon a fair construction of the legislative acts in force at the time the parol exchange, relied upon by the defendant, was made, no conveyance would pass a valid legal title to real estate, except such conveyance were by deed. If the defendant acquired any interest in the land in dispute, by the exchange with Wilkins, it is an equitable and not a legal interest, and his right must be asserted in a different manner and before another tribunal. It can not avail him as a defense in the action of ejectment, when the legal title to the land in controversy is in the lessor of the plaintiff.

The motion for a new trial must be overruled.

# CASES

DECIDED BY THE

## Supreme Court of Ohio

IN 1824.

ORDERED TO BE REPORTED BY THE JUDGES.

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WILBER v. PAINE.

*ERROR—Trespass—Statute of Frauds—Part Performance.*

Party in possession of land under parol contract may maintain trespass against the owner.

Possession given upon a parol contract for leasing lands and performance by lessee, takes the case out of the statute of frauds.

THIS case came before the Supreme Court, on a writ of error, at the May term, 1824, in the county of Jackson, Judges Hitchcock and Burnet being on the bench.

The facts were these: The defendant in error made a parol contract with one E. Shearer, that he (Shearer) should clear and fence a certain lot of ground, in consideration of which he should be permitted to raise on the premises a crop of corn. Shearer, in pursuance of the contract, took possession of the lot, cleared and fenced it, and raised his crop; but before it was gathered, he sold it to the plaintiff, Wilber, for a valuable consideration, and authorized him to gather and remove it. Notice of this sale was

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given to Paine, who afterward went on the premises, gathered the corn, removed it, and converted it to his own use, for which this action of trespass was brought.

The declaration contains two counts. The first is laid with a 252] *quare clausum fregit*. The second with an *exportavit* \*only. Plea not guilty. The court of common pleas (the president dissenting) decided that the case was within the statute of frauds and perjuries, and gave judgment against the plaintiff below, to reverse which this writ of error was brought.

DOUGLAS, for the plaintiff in error, contended :

That if any part of the case was within the statute, it must be that relating to the contract with Shearer. That the sale by Shearer could not be within it, or if it was, that it could only be avoided by Shearer himself, Paine having nothing to do with it. He also relied on the fact of part performance, and cited 5 Johns. 372; 11 Johns. 145; 1 Ld. Raym. 182; 11 East, 362; 1 Bos. & Pul. 397; 3 Day, 476; 6 East, 602; 2 Stra. 783.

BRUSH, for the defendant, contended :

That Paine may avail himself of the statute, against Wilber, otherwise Shearer by his own act, has repealed the statute. He admitted that a growing crop might be levied on, but contended that it could not be sold without writing, and relied on the cases of Howard v. Easton, 7 Johns. 205, and Emerson v. Helis, 2 Taunt. 38. He also objected to the form of the action, and contended that trespass could not be maintained.

By the Court:

The objection to the form of the action can not be maintained. The nature and object of the contract required that Shearer should be put into possession of the lot, which appears clearly to have been the fact. The sale by Shearer to Wilber transferred all his right in the crop, and if the contract had contained no stipulation in relation to the possession, it would nevertheless have transferred that right, as far as was necessary to protect, gather, and remove the crop, which could not have been done without an entry on the premises. The sale of a growing crop, without the right of entering on the premises, upon which it is growing, would be of no avail. The contract would be a perfect nullity. As

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Shearer's right of possession, by the terms of his contract with Paine, was to terminate when the crop was removed, and as the crop, with the right of removing it, was sold to Wilber, there can be no doubt as to the \*real intention of the parties. The [253 possession passed with the crop. Shearer had no right or interest remaining, and Paine, by entering and removing the corn, was a trespasser. As between the parties to this suit, there was no contract. Wilber was not privy to the agreement with Paine. He entered by virtue of a right derived from Shearer, and his proper remedy was trespass. We do not consider it necessary, however, to maintain this action, that the plaintiff should have the full and exclusive possession of the premises. A possessory right under an agreement is sufficient. The grantee, *vesturæ terræ* or *herbagii terræ*, may maintain trespass *quare clausum fregit*, though he have not the soil. Co. Lit. 4 b. An exclusive right of digging turf, is a sufficient interest in the soil to maintain trespass. 3 Burr. 1824. So he who has the exclusive right to the herbage or pasture of a close, may maintain trespass against the owner, or a stranger. Moore, 355; 5 Term, 329. So the person entitled to the exclusive enjoyment of a crop growing on land, may maintain trespass against the owner of the land, although the agreement only authorizes the cutting and carrying of it away. 6 East, 602. But in this case Shearer had the entire and exclusive possession of the lot, delivered to him under his contract with Paine, and Wilber, by his agreement with Shearer, succeeded to that possession. Paine, therefore, had no right to enter till the expiration of the term, which was to continue till the crop was gathered and removed.

But the defendant principally relies on the fifth section of the act for the prevention of frauds and perjuries, which is in these words: "That no action shall be brought, whereby to charge the defendant on any contract for the sale of lands, tenements, or hereditaments, or any interest in, or concerning of them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." As the contract which gave rise to this action, and on which the plaintiff claims the right to sustain it, is for an interest in land, it comes within the operation of the statute, and if either party had wholly refused to execute

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254] it, neither could have sustained a bill for a specific \*performance; but this court has repeatedly decided that part performance may take a case out of the statute, and although the policy of such exceptions has been questioned, we are induced to believe that, if they be admitted with caution, they have a salutary tendency; and that they are sometimes necessary to prevent the statute from confirming and legalizing the frauds it was intended to suppress. No case has been decided in this court, from which any general rule can be inferred, as to the description of part performance, that will take an agreement out of the statute. It has been settled in England that payment of money alone will not do it, because by the repayment of principal and interest the parties may be placed in *statu quo*; and because their statute has said, in relation to goods, that payment of money shall prevent its operation. This provision, existing in the statute, and being confined to one class of cases, they infer the intention of Parliament that it should not extend to any other. In the construction of our statute, this distinction can not arise, because it does not exist. The statute does not contain any provision by which payment of money, in any case, shall prevent its operation. It is not necessary, however, to express an opinion on this point, as it is not presented by the case before us. The circumstance relied on by the plaintiff in error is, that he was put in possession of the lot, and that he has performed the contract fully on his part. In the case of *Clinan v. Cooke*, Lord Reddesdale lays it down as a rule, that nothing should be considered as a part performance that does not put the party in such a situation as that it would be a fraud on him not to perform the agreement, and cites a case similar to the one before us, to illustrate his meaning and show the propriety of the rule. In *Foxcraft v. Leister*, 2 Vern. 436, it was said that the party who had been let into possession ought not to be liable as a wrong-doer, because he entered in pursuance of an agreement; that for the purpose of defending himself against a charge that might be brought against him, parol evidence was admissible, and if admissible for one purpose, there was no reason why it should not be admissible throughout.

255] \*In the Earl of Aylesford's case, 2 Stra. 673, there was a parol agreement for a lease of twenty-one years. The lessee had entered and enjoyed for a part of the term, and then the earl brought a bill to oblige him to execute a lease for the residue

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of the term. The lessee pleaded the statute, which was overruled, because the agreement had in part been carried into execution.

The cases cited from 1 *Ld. Raym.*, 11 *East*, 1 *Bos. & Pul.*, and 3 *Day*, might be in point in a case between Wilber and Shearer, but as between these parties, we do not see their application.

It has frequently been held, on the circuit, that the delivery of possession, on a parol agreement, was sufficient to take it out of the statute, and we see no reason to reverse the rule, or to reject the principle on which it is founded. When the existence of a contract is evidenced by a change of possession, which must result from the joint act of the parties, the mischief intended to be remedied by the statute is scarcely to be apprehended. The fact, as far as it goes, is as satisfactory evidence of the existence of a contract as a memorandum in writing could be, and it may be added, that under such circumstances, to enforce the statute, and leave the party who has been put into possession, by virtue of an agreement, to be treated as a wrong-doer, would not only be repugnant to justice, but would make the statute a shield and protection for injustice.

In giving a construction to any statute, the court must consider its policy, and give it such an interpretation as may appear best calculated to advance its object by effecting the design of the legislature. The great object of the statute in question is clearly expressed in the title prefixed to it. It is for the prevention of frauds and perjuries. It is not, therefore, to be presumed that it was intended, in any instance, to encourage fraud, and we may infer that any construction which would have a certain tendency to do so, would counteract the design of the legislature, by advancing the mischief intended to be prevented. Most of the decisions restricting the statute, 29 *Charles II.*, and taking cases out of its operation that might be brought within \*it, by a literal [256 construction of its terms, have been made on the same principle, as for example: although the statute requires that all contracts for the sale of lands should be in writing, yet defendants in equity have been, and are permitted to introduce parol evidence varying or discharging such contracts, or for the purpose of avoiding them for fraud, accident, or mistake, notwithstanding they are for the sale of land.

The reason commonly assigned in support of these cases is, that



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the statute is intended for the benefit of the party to be charged, yet it is easy to perceive that the decisions may be ascribed to the license of construction before referred to, and that they depend on the same principle, that the contract, as it appears in writing, can not be enforced, without a fraud on the defendant. In the case before us, we can not forbear to enforce the contract, without sanctioning a fraud on the plaintiff. It is also the constant practice to permit a complainant to vary his written contract by parol, if he can make out a clear case of fraud, such a one as, in the language of Lord Thurlow, "comes among the string of cases where it is considered a fraud upon the rule of law."

Such cases as these, and such as are founded on the fact of part performance, show it to be the impression of courts in Great Britain, and in this country, that for the due administration of justice, it is necessary, by the use of a sound legal discretion, so to interpret statutes as to advance the remedy and suppress the mischief.

On this principle, we have decided that a parol lease of a farm for one year, after the lessee had been put into possession, was valid, and that the tenant might defend his possession against his landlord, as well as against a stranger. In the case now before us Shearer was not only put into possession, but was permitted quietly to occupy till he made all the improvements that were agreed upon as a substitute for the rent, and until he had raised his crop and sold it to the plaintiff for a valuable consideration, then the defendant entered, and removed the crop, on the ground 257] that his contract \*was void, and to protect himself in this act of fraud, he sets up the statute against fraud. We have no hesitation in saying that the defense attempted is against conscience, and that the facts in this case take it out of the statute.

The judgment of the court below, therefore, must be reversed.

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Manley v. Hunt and Hunt.

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## MANLEY v. HUNT AND HUNT.

CHANCERY.—*Land—Lien—Judgment—Demurrer.*

Land sold and not conveyed, is not liable to subsequent judgment against the vendor. Sale upon execution may be stayed by injunction.

When demurrer is overruled, defendant is not permitted to answer without affidavit of merits.

THIS cause came before Judges Pease and Burnet, at the August term, 1824, in Ashtabula county.

The facts alleged in the bill were these: That one John Lay, being owner and proprietor, and vested with the legal title to a certain tract of land in the county of Ashtabula, contracted to sell it to one Harman. That in July, 1818, Harman, not having received a legal title, sold all his right and interest in the land, *bona fide*, and for a valuable consideration, to the complainant, Manley. That in November following, the defendants recovered a judgment at law against Harman. That Lay, after the recovering of the judgment, conveyed the land in question to Harman, who conveyed the same in April, 1820, to Manley, the complainant, according to his contract. That in June, 1823, the defendants sued out execution on their judgment against Harman, and caused it to be levied on the same tract of land, and that they were proceeding to sell it.

The prayer of the bill is, to be relieved from the execution and to be quieted in the possession and title.

The defendants demurred on the ground that the matter stated in the bill did not entitle the complainant to the relief prayed for.

The question discussed at the bar and submitted to the court was, whether the judgment against Harman was a lien \*on [258 the land, and authorized the defendant to proceed and sell it in satisfaction of their debt, as the legal title had been vested in Harman after the rendition of the judgment.

By the COURT:

We are decidedly of opinion that the land in question is not affected by the lien of the judgment, although the legal title was

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*Manley v. Hunt and Hunt.*

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vested in Harman subsequent to the judgment. After Lay had sold this land to Harman, he held the title in trust for him, and the land ceased to be liable for the debts of Lay. After the sale to Manley the trust inured to his benefit, and Lay became his trustee, so that the land was not liable to the debts either of Lay or Harman. There was no necessity of passing the title through Harman, the deed might have been made direct to the complainant, but as it is, his equitable rights are not affected by the course pursued, for the moment the title vested in Harman he was seized in trust for Manley, and had he conveyed the title to a third person, for a valuable consideration with notice, the lands would have continued chargeable with the trust, and equity would have decreed the title to the complainant.

It would be productive of much mischief and injustice to make trust estates liable to judgments against the trustee. Such a principle never has been, and we trust never will be recognized in this state. From the moment Harman contracted in good faith to sell the land to Manley for an adequate consideration, he became a trustee for Manley, and the land ceased to be liable for his debts on after acquired judgments. It then became liable in equity to the debts of Manley, and the purchase money, if any part of it remained unpaid, might be reached in the same way by the creditors of Harman.

The demurrer must be overruled.

The defendants then moved for leave to answer, but not having produced an affidavit of merits, and that the demurrer was not filed for delay, as the statute requires, the court were on the point of overruling the application, when, by consent of the complainant, defendants were permitted to file their answers.

\*ISAAC SPENCER, TREASURER OF THE STATE OF CON- [259  
NECTICUT, v. ELIAS BROCKWAY.

*Suit by State—Penal Laws—Effect of Judgment from Sister States.*

The state may sue in the courts of Ohio.

Suit upon a judgment for violation of penal laws in a sister state sustained.

Judgment in a sister state can not be impeached here.

If action on the case be brought on judgment from a sister state, liability and breach must be averred.

THIS cause came before Judges Pease and Burnet, at the August term, 1824, in the county of Ashtabula.

The plaintiff describes himself as treasurer of the State of Connecticut, and successor in office to Andrew Kingsbury, late treasurer of that state. The declaration contains two counts. The first states that a suit was commenced in the Supreme Court of the State of Connecticut, wherein Andrew Kingsbury, treasurer of the State of Connecticut, was plaintiff, and Elias Brockway was defendant, on a bond of recognizance, made by the said Elias to the said Andrew, as treasurer aforesaid, and that such proceedings were had that the said court rendered judgment in favor of the said Andrew, against the said Elias, for the sum of one hundred dollars debt (or damage), and cost, taxed at \$21.90.

The second count states that there was another suit at the court aforesaid depending in favor of Andrew Kingsbury, treasurer of said State of Connecticut. That such proceedings were had, that the said Elias being three times solemnly called, came not, but made default, and that judgment was thereupon rendered, that the said Andrew recover of the said Elias the sum of one hundred dollars (debt or damage) and cost, taxed at \$21.90, which judgment remained in full force, etc., by reason whereof, the said Elias became liable to pay the said Andrew, treasurer, etc., and being liable in consideration thereof undertook, etc., that the said Elias did not pay, etc., to the defendants, damage \$350.

The defendant demurred to each count of the declaration separately, and the plaintiff joined in demurrer.

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The defendant cravedoyer, and set out the records of both judgments, from which it appeared, that they were recovered on two forfeited recognizances, taken in consequence of an alleged 260] violation of the penal laws of that \*state, and that the defendant was in court, by his counsel, when his default was entered, and that on his application, the court exercised their chancery power by reducing the sum from \$200 to \$100 on each recognizance.

WEBB, in support of the demurrer, contended:

1. That the State of Connecticut can not maintain an action in the courts of this state.
2. That the courts of one state will not enforce the penal laws of a sister state.
3. That the declaration does not present such a case as will entitle the plaintiff to recover.

By the Court:

We do not discover any reason why the State of Connecticut should be prohibited from prosecuting her just claims in the courts of this state. There is not anything in the constitution, or laws of Ohio, that requires such a prohibition, nor do we believe that it is necessary, or that it would be expedient; but if the position could be supported, it would not apply in this case, because the suit is brought in the name of an individual, and not in the name of the state, and it can not be a matter of any importance for whose use the money is recovered.

The second objection is equally groundless. There is nothing in the declaration from which it can be inferred that the object of this suit is to enforce the penal laws of the State of Connecticut. If the defendant had a right to craveoyer, and if it were proper to look into the transcripts, it would be found that those laws, as far as this demand is connected with them, have been enforced in the courts of that state.

The suit is for the recovery of a sum of money. It is founded on judgments obtained in the Supreme Court of the State of Connecticut, and not on the penal laws of that state. The objection, therefore, can not be sustained.

The third ground of demurrer, leads to the inquiry, how far judgments recovered in sister states are to be regarded in this state.

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This court has often decided that judgments regularly obtained in other states, against defendants who have been served with process, or have otherwise appeared, and had an opportunity of making a defense, are to be received as conclusive evidence, and that no re-examination \*of the grounds on which they were rendered [261 can be permitted. We believe this to be the true construction of that section in the constitution of the United States, which requires that "full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state," and of the act of Congress in pursuance thereof, which requires that they shall have such faith and credit given to them, in every court within the United States, as they have by law or usage in the courts of the states from whence the said records are or shall be taken." The faith and credit here spoken of, requires us to admit, not only that there is a record, and that it is what it purports to be, but also that it is just; that the money awarded to the plaintiff is legally due, and that he has a right to recover it, without a re-investigation of his claim. Such is the effect of the faith and credit given to it in the state from whence it came, and such must be its effect here, or like causes do not produce like effects.

Had a suit been commenced on this record in the State of Connecticut, the defendant could not have questioned its correctness, in consequence of the faith and credit given to it in the courts of that state, and the same degree of faith and credit must produce the same results here. We are aware that a different opinion has been given in some of the states. In Massachusetts and New York, it has been decided that judgments obtained in other states are only *prima facie* evidence, and that the defendant, in a suit brought on such a judgment, may impeach the justice of it. But it appears to us that the provision in the constitution extends further, and embraces the effect as well as the admissibility of the record. Such a provision would seem to be of but little use, if it merely required the record to be acknowledged and received in evidence, and left its operation as it stood at common law.

In cases where both parties have been before the court, and have had an opportunity of being heard, it does not require the exercise of an unreasonable degree of confidence to conclude that justice has been done; but where the defendant has not been served with process, or had an opportunity of making his defense, the conclusion may be different. In such cases we have considered

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262] the record as *prima facie* evidence, and permitted the defendant to impeach its justice, because it shows on its face, that the merits, on his side, have not been heard, and because it would not only be deciding without evidence, but presuming against probability, to take the judgment under such circumstances as conclusive evidence that the merits have been fully heard on both sides. In the State of New York, it has been decided that an action can not be maintained in that state against a person not a resident, who has not been served with process or had actual notice. *Kilburn v. Woodworth*, 5 Johns. 41; *Robinson v. Ward*, 8 Johns. 86. This question, however, does not arise on the demurrer, and it will be unnecessary to pursue it further.

The plaintiff having seen proper to treat these records as foreign records, by bringing an action on the case, the question might have been presented in a different form, by another course of pleading, but as the issue now stands, the records are to be considered as conclusive evidence, by the uniform course of decision in this court, and our inquiry must be confined to the sufficiency of the declaration.

The first count is manifestly defective. It contains no averment of liability, or promise of payment, or breach by the defendant. The demurrer, therefore, as to that count, may be sustained. In the second count, we do not discover any substantial defect.

Judgment for the plaintiff on the second count.

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McMURTRY v. CAMPBELL.

IN ERROR.—*Suit by Assignee—Non est Factum.*

Plea of *non est factum* puts assignee to prove the assignment.

THIS case was decided in May, 1824, in the county of Gallia, by Judges Hitchcock and Burnet.

The facts were these: In December, 1821, McMurtry executed a sealed bill to William Campbell, for sixty pounds, of the value of two hundred dollars. William Campbell assigned the bill to Matthew Campbell, the defendant in error, who commenced an 263] action of debt in his own name, \*as assignee, under the statute. A judgment by default was entered, and afterward opened,

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McMurtry v. Campbell.

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on motion, and leave was given to plead issuably. The defendant filed the plea of *non est factum* with a notice of infancy, and the statute of limitations, but unaccompanied with an affidavit. On motion of the plaintiff, the court ordered the notice to be stricken out, as incompatible with the terms on which the default was opened. At the trial, the plaintiff offered the sealed bill in evidence, which was objected to, unless the plaintiff would prove the handwriting of the indorser.

The objection was overruled, and the bill read in evidence, without the proof required, to which the defendant took his bill of exceptions.

Three errors were assigned :

1. That the defendant had a right to avail himself of his notice of infancy, and of the statute of limitations.
2. That no consideration for the assignment was averred or proved.
3. That the court permitted the bill to be given in evidence, without proving the assignment, or handwriting of the assignor.

By the Court :

The statute dispensing with proof in certain cases provides, that upon plea of *non est factum* offered by the person charged as the obligor, or grantor of a deed, or plea of non assumpsit, or *nil debet* offered by the person charged as the maker of any promissory note, it shall not be necessary for the plaintiff to prove the execution of the deed or note, upon which such suit is brought, unless the party offering such plea shall make affidavit of the truth thereof.

As this action was brought against the obligor, or maker of the sealed bill, and the plea of *non est factum* was not accompanied with an affidavit, it was not necessary for the plaintiff to prove the execution of the deed, nor does it appear from the record that such proof was required. The exception taken at the trial was, that proof was not required of the assignment or handwriting of the assignor. The statute dispenses with proof of the execution of the bill; but it does not extend to the assignment. When the bill was first offered, the parties stood on the same ground that they would have occupied if this statute had not been in existence, \*and the plaintiff had proved the execution of the bill, but [264



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that testimony alone would not entitle him to recover, because it is not only necessary to show the liability of the defendant, but also the title of the plaintiff. The admission, or the proof of the execution of the bill, would establish the first point, but it could not affect the second. The plaintiff was bound to show that the right of action had passed from the obligee to himself, in order to sustain the suit in his own name, which could not be done without proving the assignment, by which the statute passes the interest, together with the right of suing in the name of the assignee.

As the case appeared before the jury, the right of the plaintiff, and the liability of the defendant, stood as they would have done, if no assignment had been made, or, in other words, a debt was proved to be due from the defendant to William Campbell, on which proof Matthew Campbell was permitted to recover.

As the statute did not dispense with proof of the assignment in this case, and as it was incumbent on the plaintiff, not only to prove the defendant's liability, but also to show his own title, the judgment must be reversed.

The opinion of the court being for the plaintiff on this part of the assignment, it is unnecessary to consider or decide the other questions that have been discussed.

Judgment reversed and cause remanded.

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LESSEE OF CUNNINGHAM AND CULLY v. B. BUCKINGHAM.

*Deed not Recorded.*

Validity of deed not necessarily destroyed by omission to record it.

Where a sheriff's deed to a purchaser upon execution is not recorded, subsequent purchase affected by presumptive notice.

THIS was an action of ejectment for a house and lot in the town of Newark, county of Licking, and was tried before Judges Hitchcock and Burnet, at the September term, 1824.

The plaintiff gave in evidence a deed from James Black to Cunningham, one of the lessors, and John Cully, for the lot in con-

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troversy, dated January 18, 1822. Consideration \$140. Also, a deed for the same premises, from John Cully to John W. Cully, the other lessor.

\*The defendant then proved that the lot in question was [265 levied on by virtue of an execution, in 1810, and sold as the property of James Black; that Schenck and Stansbury became the purchasers; that James Black, the then owner of the lot, being satisfied with the sale, agreed, for a small additional consideration, to execute a deed to the purchasers under the sheriff. He then offered a deed for the lot in question, from James Black and wife to Schenck and Stansbury, under whom he claimed, dated May 19, 1810. This deed was objected to on the ground that it had not been recorded within six months after its execution, according to the act providing for the acknowledgment and recording of deeds. The clause of the statute relied on is in these words: "And if any deed for the conveyance of lands, tenements, or hereditaments, made and executed, whereby the same shall be affected in law, or in any manner incumbered, shall not be acknowledged, or proved and recorded within the respective times allowed, the same shall be deemed fraudulent against any subsequent *bona fide* purchaser or purchasers, without knowledge of the execution of such former deed or conveyance."

The court were of opinion that the omission to record the deed did not necessarily destroy its validity. That it was not an objection to the deed itself, but to its effect as evidence in the cause, and that the objection might be rebutted by parol testimony. They, therefore, overruled the objection, and the deed was read to the jury.

The defendant then called several witnesses for the purpose of charging the lessors of the plaintiff with notice.

Mr. Statton testified that Cunningham and Cully were living in the town of Newark at the time of the levy and sale; that the sale was made near Mr. Cully's door; that the sale and the deed from Black to Schenck and Stansbury were generally known and spoken of in the town; that the making of the deed was a subject of conversation for several weeks, and that there were not at that time more than a dozen families residing in the town.

Mr. Johnston testified that he saw the sheriff's advertisement; that he was present at the sale to Schenck and Stansbury, and

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that the circumstances of the sale were generally known and spoken of in the town.

266] \*Judge Wilson testified that he recollected the sale and purchase by Schenck and Stansbury; that it was notorious and commonly talked about, and so was the deed from Black. He understood, and he thinks it was generally understood, that Houston and McDougal were in possession of the lot under Schenck and Stansbury.

Mr. Wright testified that he knew of the sale at the time; that it was generally known and talked of, and he supposed everybody knew it.

Mr. Van Buskirk heard it publicly talked of that Black had given the deed to Schenck and Stansbury.

Mr. Lincoln lived in town at the time of the sale, which was a notorious thing; he supposed everybody knew it. He thinks, from the conversation on the subject, that every person in town must have known it.

Mr. Black—he was at the sale; it was generally known.

Mr. Smith testified that Cunningham was searching the records for the deed.

Mr. Evans testified that Cunningham had told him he had searched for the deed.

The plaintiffs then called several witnesses to rebut.

Colonel Davidson testified that he had heard a long time back of the sale to Schenck and Stansbury; that some said there was a deed; that others thought not.

Mr. Obannon testified that he did not live in town at the time of the sale, but heard of it, and that there was a difference of opinion about it.

Mr. Gillespie had heard of the sale and purchase.

Mr. Elliot was in town, and knew of the sale, but not of the deed.

Mr. McDougal testified that he always understood there was a deed from Black to the purchasers, under the sheriff.

On this testimony the cause went to the jury.

The plaintiff's counsel called on the court to charge them that it was necessary for the defendant to prove that the lessors of the plaintiff had actual notice of the deed from Black, under which

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the defendant claimed; and that if such proof had not been made it would be their duty to find for the plaintiff.

\*The court refused to give the direction required; but after [267 stating the case, and summing up the evidence, informed them that the omission to record the deed did not necessarily render it void. That its validity or invalidity depended on the fact of notice, which might be proved by the same description of evidence that is admitted in other cases. That violent presumption, or the proof of such facts as imply notice, was sufficient, and that if their minds were convinced, by the whole testimony, that the lessors of the plaintiff had knowledge of the deed, under which the defendant claimed, they should be charged with notice. That a man was not at liberty to shut his eyes against the truth, and shelter himself under the plea of ignorance. That where a fact comes to his knowledge, that necessarily puts him on his guard, he is bound to make diligent inquiry, and to search for information at the sources from which it is most natural to expect it. That although the adverse possession which existed in this case, and was known to the plaintiffs, was not evidence of actual notice, yet it was a violent presumption, which, in connection with other facts, might satisfy the mind of a jury. That the cases under the registry acts of Great Britain, cited at the bar, were inapplicable, as those acts do not contain the proviso that is found in ours. They declare the instrument absolutely void, and relief against them can be had only in chancery, on the general principles of equity. Stricter proof is therefore required. The party applying for relief must make out a clear case of fraud, but our statute provides relief, and the jury is authorized to examine and decide the fact, and they must do it according to the established rules of evidence in ordinary cases, at common law.

Verdict for the defendant.

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\*HARVEY, ETC. v. BROWN, ETC.

*Minutes of Proceedings—Record.*

Minutes kept of the daily proceedings of courts are not a component part of the record, but memoranda only, from which record is made.

How minutes should be entered.

THIS cause came before Judges Sherman and Burnet at the July term, 1824, in Butler county, on a writ of error. The error relied on was that no regular judgment had been entered in the court of common pleas.

The facts of the case were these: The cause having been called in its order, in the common pleas, the defendants were defaulted, and judgment ordered to be entered against them. The clerk, in making up the minutes of the day, stated the cause, and entered the order in these words: "Judgment," etc., in which form the entry stood when the minutes were read and signed by the presiding judge. After the rising of the court, the clerk made up a complete record of all the proceedings in the cause, setting out the judgment fully and technically, and entered the same in the book provided and kept for that purpose, agreeably to the statute. The writ of error was then taken out and returned, with a transcript of that record certified in due form. An attested copy of the minutes of the court, containing the original entry of the judgment, was also annexed to and returned with the writ.

WOODS, for the plaintiff in error, contended:

That the copy of the minutes ought to be received as a part of the record on which he was at liberty to assign errors. That the entry on the minutes of the court below was not made in pursuance of the statute. That it was a perfect nullity, and did not authorize the record subsequently made up, and now returned with the writ of error.

By the COURT:

The copy of the minutes forms no part of the record, and can not be considered as the foundation of an assignment of errors.

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Harvey, etc. v. Brown, etc.

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The statute makes a clear distinction between the daily entries on the minute book, and the complete record which is to be made up in the vacation and entered in the book of records. The former is intended to prevent mistakes in entering the orders of the day, and to detect them where they are made. The latter is considered \*the record of the cause, and supersedes the necessity [269 of any further recurrence to the minute book. The writ of error must be returned with a transcript of this record, and the assignment must be predicated on it. The plaintiff can not be permitted to contradict it by a paper purporting to be a copy of detached parts of the proceedings in the cause.

Such a course is unprecedented, and might jeopardize a large portion of the judgments that have been rendered in the common pleas throughout the state. On the same principle, the copy of any paper, improperly admitted or rejected, or of any motion improperly granted or overruled, might be tacked to the record, without having been made a part of it by a bill of exception. Such a practice would lead to endless confusion—it would destroy the certainty of records, and defeat the object for which they are made. The entries which are required to be made in vacation are the records of the court, and as there is no error in the transcript of that record, the judgment must be affirmed.

It may not be improper, however, to make a remark on the manner in which the entries should be made on the daily minutes of the court. Although the eighty-seventh section of the judiciary act, which requires the proceedings to be entered, read, and signed, does not prescribe the form in which the minutes shall be kept, or expressly require the orders, judgments, and decrees to be entered at length, or direct the clerk to pursue the exact form of those entries in making up the record, yet that course would be the most safe one, and would be most conformable to the spirit of the statute. This, however, has not been the common construction given to that section by the clerks throughout the state. Many of them have considered the minutes as concise memoranda of the proceedings of the day, from which full records were to be made up in the vacation, and if those memoranda were sufficiently explicit to enable them to make the record with certainty and correctness, they have considered them as made in conformity with the statute. This construction has probably resulted from the reason given in the statute for requiring the duty, which is “to prevent errors in entering

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Treasurer of Champaign County v. Norton.

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the judgments, orders, and decrees of each court." It is the opinion 270] of this court, however, that the \*correct course is to make the entries with the same technical precision as is required in the complete record made up in vacation.

Judgment affirmed.

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THE TREASURER OF CHAMPAIGN COUNTY v. H. NORTON.*Appeal from the Common Pleas.**Practice—Suit against Administrator.*

Acquiescence of attorney of record binds the party.

Appeal does not vacate submission on report made in common pleas.

THIS cause came before Judges Burnet and Sherman, in the county of Clark, at the July term, 1824.

It was an action of debt brought on an administrator's bond. From the record it appeared that the parties had submitted the cause to the court of common pleas, on an agreed case. The court referred it to a special commissioner, who reported a balance due from and in the hands of the defendant as administrator. Exceptions were filed to the report, which were overruled. Judgment was entered for the plaintiff and an appeal taken to this court.

O. PARISH, for the defendant, moved to set aside the report:

First, because the submission was made to the common pleas without the knowledge or consent of the defendant's attorney on record. Secondly, because the report having been made on a reference in the common pleas prior to the judgment, it ought to be considered as vacated by the appeal.

As it appeared from the record that the cause had remained in the court below more than a year after the submission before the rendition of judgment, during which time one of the attorneys of that court, at the request of the attorney on record, had answered to the suit without objecting to the submission or the reference, and it appearing further that the submission and agreed case were

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Miller v. Commissioners of Montgomery County.

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signed by the attorney of a co-defendant, with the knowledge of the agent of Norton's attorney, the court were of opinion that whatever might have been the merits of the motion, had it been made in time, it was then too late for the party to avail himself of it.

\*On the second ground, it was the opinion of the court that [271 neither the submission nor the report were vacated by the appeal, but that the report was open to the same exceptions as in the court below. Motion overruled.

The defendant then took sundry exceptions to the report, some of which were sustained; and it appearing that payments had been made by the defendant for the benefit of the estate, which had not been submitted to the commissioner, in consequence of the vouchers not being in the possession of defendant, the case was referred to the same commissioner for re-examination and report at the next term.

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MILLER v. THE COMMISSIONERS OF MONTGOMERY COUNTY.

*Collector's Bond.*

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Summary proceedings by motion can not be had upon official bond erroneously taken.

THIS cause came before Judges Sherman and Burnet, on a writ of error, at the July term, 1824, in Montgomery county.

It appeared from the record that James L. Miller had been appointed collector for the county of Montgomery, and had executed a bond, payable to the treasurer of Montgomery, conditioned for the faithful performance of his duty. The money contained on the duplicate not having been paid over agreeably to the condition of the bond, the commissioners served the collector with notice of a motion for judgment, and in pursuance of that notice a motion was made before the court of common pleas, and a judgment entered in the name of the commissioners against the collector for the sum claimed to be due, with twelve per cent. damages thereon, and cost of suit. To reverse this judgment, the writ of error was sued out.



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Smurr v. Forman.

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ALEXANDER, for the plaintiff, relied on two errors:

First, that the bond, not having been taken agreeably to the statute, was void. Second, that the court were not authorized to render a judgment against the collector for a greater penalty than ten per centum.

272] \*By the Court:

The statute under which these proceedings were had, requires the collector to give bond "to the commissioners, in behalf of their county, with such security as said commissioners may approve." By this we understand that the bond must be made payable to the commissioners for the use of the county. There is not any provision in the act which authorizes the bond to be made payable to the treasurer, and whatever might be our opinion as to the validity of this bond at common law, and notwithstanding it might support an action of debt in the name of the treasurer for the use of the county, it does not authorize a resort to the summary proceedings allowed by the statute. But if the commissioners were at liberty to take the bond in the name of the treasurer, the proceedings should have been in his name also, in pursuance of the bond.

The second error assigned seems to be predicated on a misapprehension of the statute that governs the case.

The section referred to, giving a penalty of ten per centum, relates to the state tax, and not the county levy, on which the law directs a penalty of twelve per cent. In this respect, therefore, there is no error; but for the first error assigned, the judgment must be reversed.

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SMURR v. FORMAN.

*Order for Money on Regimental Paymaster.*

A colonel is not liable upon orders drawn on a regimental paymaster.

THIS cause came before Judges Hitchcock and Burnet, in Wayne county, 1824, by writ of error.

HARRIS, for the plaintiff; AVERY, for defendant.

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Smurr v. Forman.

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The declaration contained four counts: The first was for a horse sold and delivered; the second, third, and fourth charged the defendant as indorser of three several orders, each drawn by the colonel of the second regiment of the third brigade of the sixth division of the Ohio militia, signed by him in his official character, directed to the paymaster of the same regiment, requesting him to pay John Smurr, for a drum, ten dollars out of the regimental fund, which \*orders had been severally assigned by Smurr to [273. Forman, and were declared on as bills of exchange.

The assignments were in these words: "I assign all my right and title of the within order to Alexander Forman."

There was a general verdict and judgment for the plaintiff, to reverse which, the writ of error was sued out.

The error principally relied on was, that the action could not be sustained against Smurr, as indorser of those orders.

By the COURT:

These orders were drawn agreeably to the directions of the statute relating to the militia, and were payable out of the regimental fund, in the hands of the paymaster. It was not the intention of the law, in any event, to render the colonel liable on these orders, or to place them on the footing of negotiable paper. They are given and received on the credit of a particular fund, and it is well understood that the holder is to look to that fund for payment. This was the nature and effect of the orders in the hands of Smurr, and when he assigned them, he passed nothing more than the right then vested in himself.

In case of a delay of payment, he had no recourse on the colonel, as a drawer of a bill of exchange, and when he assigned them, he gave no recourse on himself as an indorser of a bill of exchange. The assignee took them on the credit of the fund, and to that he must look for payment.

The statute making certain instruments of writing negotiable, contains a restricting clause. It provides that nothing in the act contained, shall be construed to make negotiable any bond, note, or bill of exchange, drawn payable to any person or persons alone, and not drawn payable to order, bearer, or assigns. These orders were drawn payable to Smurr alone, and not drawn to order, bearer, or assigns.

The transaction appears to have been *bona fide*, and without.

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Leffingwell v. Flint

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fraud or misrepresentation, but had it been otherwise, the assignee must have sought his remedy in a different form of action. He could not treat the orders as bills of exchange, and infer the liability of the defendant from the assignment alone. His remedy must have been by a special action on the case.

For these reasons, we are of opinion that the second, third, and fourth counts are bad, and the verdict being general, that the judgment must be reversed.

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## \*LEFFINGWELL v. FLINT.

*Justice of Peace—Cost on Appeal.*

An appellant from the judgment of a justice is not bound to pay the costs before he can demand transcript.

A justice is liable to action for refusing transcript.

THIS case was tried before Judges Pease and Burnet, in Trumbull, at the August term, 1824.

The facts of the case were these: The defendant being a justice of the peace in the township of Warren, on an application for that purpose, issued a summons against the plaintiff, on which a judgment was afterward rendered for \$28.81, and cost of suit. The defendant, Leffingwell, gave notice of an appeal to the court of common pleas, and before the expiration of the ten days allowed for that purpose, executed a recognizance, with security, approved of by the justice, and then demanded a transcript of the proceedings, which was refused, unless he would pay the cost of the suit, amounting to about \$7. The appellant refused to pay that sum, but offered to pay the fee for the transcript, and tendered thirty-one cents. The transcript was withheld. The appellant lost the benefit of his appeal, and an execution issued against him on the judgment, by which a part of his property was taken and sold. It also appeared from the record, that the writ, in this suit, issued before the commencement of the term to which the transcript ought to have been returned. The defendant pleaded not guilty, with a notice that he was always ready to give the plaintiff the

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Dawson v. Holcomb.

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transcript required, on his paying the cost of the suit, which he refused to do.

The cause was tried in the common pleas, and removed to this court by appeal.

A number of witnesses were called, who proved the facts substantially as charged in the declaration.

The principal points contested were, whether the justice had a right to withhold the transcript, in consequence of a refusal to pay the cost, and whether the suit was not commenced before the cause of action arose.

The opinion of the COURT was against the defendant on both points:

The statute is not only silent as to the payment of cost, but requires the appellant to give security for the debt and cost, and cost that may accrue in the court of common pleas; it is, therefore, impossible to suppose that \*the costs are to be paid before [275 the appeal.] It would be an outrage on common sense to give the law such a construction, as would require the appellant to pay the cost, and, at the same time, to give security to pay them.

The second point is equally clear. The justice is not to deliver the transcript to the clerk of the court of common pleas. It is his duty to hand it to the appellant, on demand, and it is the duty of the appellant to deliver it to the clerk, on or before the first day of the term next following the appeal. The cause of action, therefore, arose at the time the security was given and the transcript demanded.

Verdict for plaintiff.

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DAWSON v. HOLCOMB, SHERIFF OF GALLIA COUNTY.

*IN ERROR.—Sheriff—Money received on Execution—Attachment.*

Money received by a sheriff on execution can not be attached in his hands.

THIS case came before the court, consisting of Judges Hitchcock and Burnet, at the May term, 1824, in Gallia county.

It appeared from the record, that Dawson recovered these judg-

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Dawson v. Holcomb.

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ments, against Joseph Fletcher, in the Supreme Court, which were regularly certified to the common pleas, with a special mandate to carry them into execution. That, on the 14th of December, 1822, executions were issued thereon, and put into the hands of the defendant, Holcomb, who was sheriff of Gallia county, to be executed. At the May term following, Holcomb returned the executions, with an indorsement that he had made the money, as he was commanded, and that, having the money in his hands, a writ of foreign attachment, at the suit of Fletcher, the defendant, in execution, against Dawson, the plaintiff in execution came to his hands, by virtue of which he attached the said money, so that he could not have it before the court, to be paid over, etc. Dawson, having demanded the money, served the sheriff with a notice of amercement, according to the statute, and in pursuance of that notice, moved the court below for judgment, which motion, on hearing was overruled, on the ground that the sheriff was excused from paying the money, by reason of the attachment. To reverse that judgment, the writ of error was sued out.

**276]** \*Opinion of the Court:

We see nothing in this case that could protect the sheriff against the motion to amerce. By the terms of the writ of execution, he was not merely commanded to make the money, but to have it before the judges on the return day, to satisfy the plaintiff. In strictness of law, he was not at liberty to pay it over to the judgment creditor before he brought it into court, and although this is often done with impunity, yet it is always at the risk of the officer, and if a third person should appear from the record to have an equitable right to the money, it would become a question whether such payment would exonerate the officer.

The form of the writ, as far as it goes, is good evidence of the duty of the sheriff. He may be held to a literal compliance with it, and whenever that is dispensed with, it is not because he has a legal right to do so, but because the court are presumed to have permitted it. While the money remains in the hands of the officer, it is in the custody of the law. It does not become the property of the judgment creditor till it is paid over, and consequently is not liable to be attached as his. The writ of attachment could not supersede the execution, or release the sheriff from a literal compliance with its command, which required him to

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Dawson v. Holcomb.

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bring the money into court, so that it might be subject to their order. Cases frequently occur, in which the right to receive the proceeds of a judgment is contested, and in which the decision of the court is necessary as a guide to the officer.

It will not be contended that he is the proper person to determine the rights of claimants; but if he may legally dispose of the money, before the return of his writ, that power is necessarily vested in him. In the case of *Ross v. Clark*, 1 Dall. 354, the defendant had obtained a judgment against Ross, who paid the money into the hands of the prothonotary, and then attached it. On a rule to show cause, the court quashed the writ, because the money in the hands of the prothonotary was to be considered in the same state as if it had been paid into the hands of the sheriff. In the case of *Turner v. Fendall*, 1 Cran. 117, it was the opinion of the court that, although money could be taken in execution, if in the possession of the defendant, yet that it could not be so taken till it had been paid over to the person entitled to receive it, because, until so paid, it does not become his \*property—he has not the actual legal ownership of the [277 specific pieces of coin which the officer may have received. Such a right, say the court, can only be acquired by obtaining the legal or actual possession of them, and until this be done, there can be no such absolute ownership as that an execution may be levied on them. By the authority of this case, the money in question was not liable to an execution while in the hands of the officer. It would be difficult, then, to assign a reason why it should be subject to an attachment, for, in this case, as well as in the other, it is necessary that the thing taken should be the property of the person against whom the process issues.

The second section of the statute regulating attachments requires the officer to whom it is directed, to go to the place where the property is, or may be found, and there, in the presence of two creditable witnesses, to declare, that by virtue of the writ to him directed, he attaches, etc. The third section requires that if the property be left with the person in whose custody or possession it shall be found, that person shall enter into bond to the officer, with two good and sufficient sureties, with condition that such property, or the appraised value thereof, shall be forthcoming, etc. Now, it may be asked how the sheriff could discharge this duty in the case before us? But it is not thought necessary to

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Lessee of Curtis v. Norton.

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rely on the impossibility of a literal compliance with these requisitions of the statute, although a strong argument might be drawn from them, in favor of the position that the act was not intended to apply to a case like the present, or if it was, that the process should be directed to some other person. A strong argument might also be drawn from the mischievous consequences that would follow such a course of practice. It would lead to endless delay and vexation. One attachment might follow another, till the whole demand was absorbed in cost. The honest creditor, on the eve of receiving the fruit of his judgment, might find himself farther from his object than when he sued out his original process. In short, the introduction of such a practice would measurably defeat the aim of legal process, as far as it is resorted to for the recovery of money.

We are clearly of opinion that the sheriff's return contains no apology or excuse for the non-payment of the money, and that he 278] ought to have been amerced on the motion of the plaintiff. If the attachment issued with a special reference to the detention of this particular sum in the hands of the officer, it was an abuse of the process of the court. This, however, we are satisfied was not the fact, from the known respectability of all the parties concerned in the transaction.

The judgment must be reversed, and the cause remanded to the common pleas for further proceedings.

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LESSEE OF CURTIS V. NORTON.

*Sheriff's Deed.*

A sheriff's deed is not valid unless the sale is approved by the court, and an order for the deed made.

THIS cause came before Judges Hitchcock and Burnet, at the September term, 1824, in Knox county.

The lessor of the plaintiff claimed title under a sheriff's deed, made on a sale of the premises in question, by virtue of judgments

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Lessee of Curtis v. Norton.

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and executions against Samuel H. Smith. In order to lay a foundation for offering his deed in evidence, he produced the record of a judgment for \$1,446.50 against S. H. Smith, in favor of James Smith, entered on the 14th September, 1822; also, the record of a judgment for \$450.17, against the same defendant, in favor of William Stansbury, entered at the same time. He also produced two executions issued on the aforesaid judgments, which had been returned, levied on the premises in question. The report of the appraisers was also produced, valuing the property at \$1,325, and the return of the sheriff that he had sold it to the plaintiff, on the executions aforesaid, and made \$835. He then offered the sheriff's deed, made in pursuance of that sale. This evidence was objected to, unless the plaintiff would produce an order of the court for the execution of the deed, in pursuance of the tenth section of the act regulating judgments and executions.

By the Court:

The question now presented is a new one. The provision on which the objection is taken, was first introduced into our code by the act of 1822, and we are now, for the first time, called on to give it a construction. \*The words of the proviso are these: [279 "That if the court, to which any writ of execution shall be returned by the officer, for the satisfaction of which any lands and tenements may have been sold, shall, after having carefully examined the proceedings of such officer, be satisfied, that the sale has, in all respects, been made in conformity to the provisions of this act, they shall direct their clerk to make an entry on the journal, that the court are satisfied with the legality of such sale, and an order that the said officer make to the purchaser a deed for such lands and tenements, which deed, so made, shall be *prima facie* evidence of the legality of such sale, until the contrary be proved."

The act of 1824 contains the same provision, with these additional words, "and the officer, on making such sale, may retain the purchase money in his hands till the court shall have examined the proceedings as aforesaid, when he shall pay the same over to the person entitled thereto, agreeably to the order of the court."

The plaintiff contends that it is optional with the purchaser to



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Lessee of Curtis v. Norton.

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pursue this course, or not—that it was intended for his ease and benefit, and that the only consequence of his omitting to pursue it is, that he must show the legality of all the proceedings anterior to his offering the deed. This exposition is rendered plausible by the manner in which the proviso is introduced, but we do not discover any substantial reason why that construction should be adopted. Viewing the proviso in connection with other parts of the statute, relating to the same subject, we are led to the conclusion that it was the intention of the legislature, that deeds should not be executed by the sheriff until an examination was made, and an order for that purpose entered on the journal.

The construction contended for by the plaintiff would take away the principal part of the benefit that the legislature seem to have intended. We can not believe it was their design merely to aid and protect the rights of the purchaser, when the same proviso, with a more extended, and equally natural construction, would also protect the rights of the parties to the judgment, and prevent much of the litigation that arises from irregularity in the proceedings of sheriffs. Although the letter of the statute does not expressly re-  
280] quire \*the examination and the order, before the execution of the deed, yet we incline to the opinion that the spirit of it does. We feel disposed to give the proviso a liberal construction, and to extend the relief as far as the terms used in the law will justify. If we look at the object in view we must conclude that it was to prevent, as far as possible, the difficulties that arise from illegal proceedings on writs of executions. The difficulties not only affect purchasers, but also the parties, and frequently third persons. It would be unreasonable, then, to give the law that limited construction which would rob it of more than half the remedy which it seems to have provided. If the statute in this particular intended nothing more than to authorize the purchaser, by pursuing the course prescribed, to offer his deed without showing the previous proceedings, and thereby throw the onus on his opponent, it has done but little to cure the evil, and remove the inconvenience heretofore experienced; but we can not believe the views of the legislature were so limited, when the provision they have made, without doing violence to the terms in which it is couched, will admit of a more enlarged construction and a more extended relief.

From the best view of the subject we have been able to take, we have come to the conclusion that in all cases the proceedings of

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*Lessee of Curtis v. Norton.*

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the sheriff must be examined, and approved by the court, and an order obtained before the execution of a deed. This construction is strengthened, by referring to the additional clause in the law of 1824, authorizing the officer to retain the money till the examination is made, and then to pay it over, on the order of the court.

This course, not having been pursued, the deed can not be given in evidence.

The plaintiff submitted to a nonsuit.

# CASES

DECIDED BY THE

## Supreme Court of Ohio

BEFORE ALL THE JUDGES,

AT A SPECIAL SESSION HOLDEN AT COLUMBUS, DEC., 1824.

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JOHN ROADS *v.* J. C. SYMMES AND W. STANBERRY.

DAVID BEAVER *v.* SAME DEFENDANTS.

ZIBA LINDLEY *v.* SAME DEFENDANTS.

*Lien—Execution—Equities—Sheriff's Deed.*

Judgment is a lien on debtor's lands.

Lien is co-extensive with the jurisdiction of the court.

Not a lien upon after-acquired land conveyed before levy.

Under the laws of Congress, legal title does not vest until patent issues

Equitable interests in land can not be sold upon execution at law.

The law of 1795 did not require an inquest upon unimproved lands.

A process from a general court can run throughout the state, without the *testatum* clause.

What lands should be first seized in execution is not open for inquiry after sheriff's deed.

Acknowledgment of sheriff's deed is indispensable.

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Roads v. Symmes, etc.

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The law of 1795 is in force as to sales under judgments rendered before the 14th of January, 1802.

Acknowledgment can not be presumed.

Deeds made in other than Hamilton county are ineffectual.

THESE were several bills in chancery, filed in Licking county, and adjourned for decision at this court.

The complainants severally were in possession of separate parcels of the fourth section, first township, thirteenth range of United States military land, situate in Licking county. This section or quarter township contained four thousand acres. The complainants derived title under a sheriff's sale, and the bills were brought to obtain a disclosure of a claim set up by the defendants and to have the title of the complainants quieted.

The material facts of the case were as follows: On the 8th of February, 1800, the land in question was located and registered in the name of John Cleves Symmes, and patented to him on the 3d of April following.

At March term, 1800, of the general court sitting at Cincinnati, Daniel McLure recovered a judgment against J. C. Symmes for \$3,882.16. On the 10th of April of the same year a *fi. fa. et lev. fa.* was sued out on this judgment, directed to the sheriff of [282 Hamilton county, which process was from time to time renewed, tested alternately at Cincinnati and Marietta, until October, 1802. Upon these processes about four hundred and thirty dollars was made. In October, 1802, a *fi. fa. et lev. fa.* was sued out, and directed to the sheriff of Fairfield county. Upon this writ the following return was made:

"*Nulla bona*; and I have levied on five tracts of land in the military grant, to wit: section 1, township 4, range 16; section 4, township 1, range 13. Also, two thousand six hundred and fifty acres, on the east side of section 4, township 4, range 16. Also, one thousand nine hundred and eighty-four acres, on the west side of section 1, township 3, range 16. Also, two thousand two hundred and seventy-five acres, being part of section 3, township 3, range 14, of which I have sold seven thousand acres, and made two thousand six hundred and eleven dollars. The residue of the land remains unsold for want of bidders."

On the 10th of December, 1803, a *vendi.* issued from the supreme court of Hamilton county founded on the above levy and return,

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Roads v. Symmes, etc.

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for the sale of the lands returned unsold. This *vendi.* was directed to the sheriff of Fairfield county, and was returned by the sheriff that he had sold one thousand acres, in section 4, township 1, range 13, to one Stone, who, on tender of the deed, refused to make payment.

On the 25th of August, 1805, an *alias vendi.* issued from the same court, directed to the sheriff of Fairfield county, upon which he returned, "sold the within three thousand two hundred and seventy-five acres of land, as the law directs, on the 30th of September last—one thousand acres to Elnathan Scofield, for two hundred and fifty dollars; two thousand two hundred and seventy five acres to Daniel McLure, for one hundred and five dollars."

The complainant, John Roads, claimed the northeast quarter of section 4, township 1, range 13, sold to Daniel Vanmetre, upon the first sale, for five hundred and seven dollars. The purchase money was paid on the 7th of March, 1803, and a deed executed and delivered on the 8th of April, in the same year. This deed was not acknowledged by the sheriff until May, 1822, when it was acknowledged by Kratzer, the original grantor, in the supreme court of Clermont county. Roads deduced a regular title from Vanmetre.

283] Daniel Beaver claimed the southeast quarter of the \*same section sold upon the first sale, and bid off to Abraham Kinney. On the 20th of June, 1803, Kratzer conveyed to Kinney. The deed is not acknowledged by the sheriff, but is proved by one subscribing witness and recorded.

On the 13th of July, 1803, Kinney made to Kratzer, the sheriff who made the sale, a power of attorney to sell all his lands in Fairfield county. Under this power, Kratzer conveyed the land in question to Daniel McLure, the plaintiff in the action, for five hundred dollars, from whom Beaver deduces title.

Ziba Lindley claims the one thousand acres sold at the second sale to Elnathan Scofield. The conveyance was made by the sheriff to Scofield on the 15th of April, 1806, but was not then acknowledged. This was done by Kratzer, in the supreme court of Clermont county, May, 1822. Scofield conveyed to Lindley, November 7, 1806.

The defendants claim title under John C. Symmes, who, on the 26th of January, 1801, conveyed to the defendant, John C. Symmes, Jr., section 4, township 1, range 13, for the consideration expressed in the deed of \$4,000 and took back a mortgage on the

## Roads v. Symmes, etc.

premises to secure the payment. John C. Symmes entered satisfaction on this mortgage, October 15, 1803.

Testimony was taken in the cause impeaching the integrity of the sale by Kratzer, as sheriff, to Kinney, and also the fairness of the conveyance between Symmes. But as the court deemed it unnecessary to decide upon either allegation, that part of the case is omitted.

It was also in proof that John C. Symmes, the debtor, owned other lands than those levied on at the time the levy was made, the title to which stood in his own name.

STANSBERRY objected to the validity of the title of the complainants upon the following grounds:

1. The judgment rendered in Hamilton county, in March, 1800, did not attach as a lien upon the land in question before levy made, because the legal title was afterward acquired by the judgment debtor.

2. No inquest was held upon the land as required by law.

3. No execution could issue from Hamilton to Fairfield county, and if any could issue, it ought to have been a *testatum*.

\*4. The return upon the *fi. fa. et lev. fa.* to Fairfield county [284] does not specify the lands sold, and this can not be explained by parol.

5. John C. Symmes had other lands not conveyed, upon which the judgment ought to be executed before lands aliened could be taken.

6. The lands claimed by Lindley, and sold on the *vendi.*, are not described in the writ, which is indispensable.

7. Under the law, a *liberari facias*, and not a *vendi.*, was the proper, and only proper process.

8. The act of 1802 does not affect the case, because the law of 1795 remained in force for enforcing judgments rendered before the act of 1802.

9. The acknowledgment by the sheriff, in open court, of a deed for lands sold upon execution, is essential to the validity of such deed, under the act of 1795, and the acknowledgment by Kratzer, in 1822, can not avail anything.

1. The judgment did not attach as a lien. It was rendered in March, 1800. The patent to Symmes is of subsequent date, April,

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Roads v. Symmes, etc.

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1800. The deed from Symmes, the debtor, to Symmes the present defendant, is dated January 26, 1801. The execution upon which the land was sold, issued in October, 1802.

It is settled in Pennsylvania, that "a judgment is not a lien upon lands subsequently purchased by defendant, and aliened before execution issued." 5 Binney, 135. In a country like this, where land is an article of trade and barter, this principle is correctly settled. It is settled differently in England, because the reason there is different—land is not a subject of merchandise, but remains permanently in a few hands, secured to the possessors by various limitations and restrictions against alienation, and is in no case, as with us, subject to be sold upon execution, as a chattel.

The land in question was located and registered by Symmes before the judgment, and it may be insisted that the judgment attached as a lien upon the interest he had acquired. In Pennsylvania, it is decided that a judgment is a lien upon every kind of equitable interest in land, vested in the debtor at the time of the judgment. 3 Binney, 4. But a different rule has prevailed in this state. Our legislation \*and adjudications have proceeded upon a different principle. Equities of this kind are frequently secret, except between the parties, and no man could be safe in purchasing lands, if judgments against any who have had an equitable interest attached as a lien upon that interest under any circumstances. If the lien exist, it ought to be perfect, so as to prevail against a purchaser without notice. If it be imperfect, dependent upon the purchaser having notice, it would serve no useful purpose, but would tend to introduce uncertainty in titles, and extended litigation.

2. The sale of lands is irregular, because the proceedings do not show that any inquest of valuation was held.

The law of 1795 provides that it shall not be lawful for sheriffs to make sale of lands upon execution, where the yearly rents or profits would be sufficient within seven years to pay the debt and costs. And the third section provides, that if the clear profits shall not be found sufficient to pay the debt or damages in seven years, "by inquest of twelve men," the sheriff or other officer shall certify the same upon the return of the execution, whereupon a *vendi*. shall issue to sell such lands.

No such proceedings were had in the case, and upon the princi-

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ple decided in the case of Patrick's lessee vs. Oosterout, 1 Ohio, 27, the sale is void.

3. The writ of *fi. fa. et lev. fa.* issued from Hamilton county to the sheriff of Fairfield county, is not a *testatum*, and therefore is void.

There is no authority for issuing an execution to the sheriff of a county other than that in which the judgment is rendered, unless it be a *testatum*. Tidd, 929; 2 Caine, 62; 3 D & E. 388. The authority to issue execution to a different county is given by a subsequent statute, not in force when any of these processes issued.

4. The return upon the writ of execution does not specify the lands sold—and this can not be explained by parol.

The return sets out a levy upon certain lands specifically described, and adds, "of which I have sold 7,000 acres, and made \$ 2,611; the residue of the lands remains unsold for want of bidders."

Roads & Beaver claim 2000 acres under this sale, and to sustain their claims they insist upon introducing parol \*proof, that [286 the lands they claim were in fact sold under this writ, and are included in this return. But this, we maintain, can not be permitted. It is laid down in 7 Mass. 388, 392, that "an officer's return must be in writing. The owner has no regular means of knowing whether the officer has done his duty other than by inspection of his return." "Extent by sheriff not made conformable to law void." 9 Mass. 92. "A return by sheriff necessary to validate a sale." 9 Mass. 141.

It may be said that these cases have no application here, because in Massachusetts the sheriff makes no deed for land delivered upon execution. The land is delivered to the creditor at the appraisal of men, and the creditor holds by virtue of the sheriff's return alone. Therefore great strictness is required. These, however, are not cases of returns where lands are delivered to the creditor. They are both cases that relate to personal goods; and in the last, Judge Parker says, "the first question which arose on the trial of this cause, respected the evidence of the plaintiff's title, he claiming by virtue of a sale under execution, but produced no evidence of such sale, except parol proof of the doings of the officer. This objection was overruled at the trial; but upon consideration the court is of opinion that it ought to have prevailed. The property did not pass to Hammet so as to enable him to maintain tres-



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pass; for that a written return by the officer, stating particularly his proceedings, is necessary to vest in any purchaser under an execution the property in the goods of the debtor."

It is certain that at the common law no return was deemed necessary of the proceedings had upon a writ of *feri facias*. The writ itself need not be returned. In Fulwood's case, 4 Coke, 67, the court goes so far as to decide that no final process need be returned, if it be absolutely final, upon which no further judgment or process is to be had. The courts of New York, and the other states, have adopted this rule without sufficient inquiry into the reason upon which it was originally founded. This, no doubt, was the contempt with which the original founders of the common law regarded every description of chattel property.

The Supreme Court of the United States, too, seem to have 287] adopted the same opinion. In *Wheaton v. Sexton*, 4 \*Wheat. 506, it is decided that a sale of land is good, though made after the return day of the execution. The court say, "whether the marshal makes a correct return, or any return at all, is immaterial."

As land can not be sold at the common law, the correctness of this position must depend upon the provisions of the legislative act that authorizes the sale. The present statute of Ohio requires the court to make a certificate of the correctness of the sale, before the sheriff shall execute a deed. It will hardly be contended that this certificate should be made without a return of the execution whereon to found it. The principle in Fulwood's case would require a return; for there it is held that in the case of an *elegit*, where an inquisition is to be taken, the writ ought to be returned to the intent that the court may judge of the sufficiency or insufficiency of the inquisition.

The same principle required a return of the execution under the law of 1795. That law required the sheriff to appear in open court to acknowledge the deed; without such acknowledgment the deed is inoperative. And this is required that, upon the sheriff's appearing in court to acknowledge the deed, the validity of the sale, and the regularity of the proceedings on the execution, may be inquired into and adjudicated upon.

In 2 *Sergeant & Rawle*, 54, Chief Justice Tilghman says: "The sale of land by the sheriff, and conveyance of title to the purchaser, is founded upon act of assembly, and not upon the common law. The form prescribed by our act of assembly of 1705 must

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therefore be pursued. The sheriff is directed to give the purchaser a deed *duly acknowledged in open court*. The acknowledgment can not be dispensed with, and can be made nowhere but in court. This provision was necessary to *enable the court to exercise their authority over the sale*. Irregularities often take place, which would occasion great inconvenience if not corrected in a summary way. It is often necessary to set the sale aside, and order a new one. Where there is cause of complaint, the party injured makes his application to the court before the deed is acknowledged, and the acknowledgment is then suspended until the matter is decided."

\*Again. The law under which this sale was made, re- [288] quires an inquest to be held to determine whether the rents are sufficient to pay the debt in seven years. It may be conceded that this inquest is unnecessary where the lands are in woods so as that they can not be productive. But this is a fact which must always be open for investigation when the sheriff comes to acknowledge the deed. And whatever fact excepted the case from the operation of general law ought to be returned on the writ so as to make part of the record. The court should see that there was a return to support the sale before they permitted the sale to be acknowledged.

It is clear upon both authority and principle that a *fi. fa. et lev. fa.* under the law of 1795 was not a final process upon which the sheriff could sell and convey the lands without any subsequent adjudication upon the case. On the contrary the sale could not be perfected without an order or act of the court receiving the acknowledgment of the deed. A return of the writ was indispensable according to the doctrine in Fulwood's case. And for the same reason the decisions in New York do not apply. These lands are sold absolutely, as chattels, upon execution, and the sheriff makes the conveyance without any act of the court.

The return is manifestly deficient. It does not specify whether the 7,000 acres were sold in gross to one person or in separate tracts to different persons; nor is any description given of the 7,000 acres of land sold. The return ought to have been such as to enable each purchaser separately to apply for his deed, and also to enable the court to decide separately upon the propriety of taking the acknowledgment of each deed. The foundation upon which each separate conveyance was made would thus appear.

The land sold ought to have been specifically described in the re-

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turn, so that the part remaining unsold could be distinguished and sold upon subsequent process, without investigating any matter previously transacted. No fact essential to make out a connected title to land ought to rest in parol, except in cases of descent. In all other cases it should be not only in writing, but matter of record. A return upon the execution describing the land sold, 289] and the \*purchaser is indispensable to connect the title. And this connection can not be supplied by parol.

5. J. C. Symmes had other lands, not conveyed, upon which execution ought to have been levied.

From documents exhibited in the cause, it appears that 12,000 acres of land was held by Symmes in his own name, when the execution was levied upon the lands in question. This land ought to have been seized and sold by the sheriff before the lands aliened to J. C. Symmes, Jr., could be taken.

In the case of *Clowes v. Dickinson*, 5 Johns. Ch. 240, Chancellor Kent thus lays down the law: "A judgment creditor can not enforce his judgment against the land of a subsequent purchaser, as long as there is land of the debtor remaining sufficient to satisfy the judgment. He can resort to the land sold only for what remains unpaid of his debt, after the other estate of the debtor is exhausted."

This is but a recognition of a principle of the common law long and well established. It is substantially asserted in *Sir William Harbart's case*, 3 Co. 11 C. And it is there laid down that if there be several purchasers, and one only be extended for the entire debt, he may by *audita querela*, or *scire facias*, as the case may require, defeat the execution and compel the conusee to sue execution on the whole land. See also *Cro. Ja.* 506; 2 *Saund.* 23; 1 *Salk.* 601; 2 *Bac. Abr.* 696.

6. The *vendit.* contained no description of the land to be sold, and is therefore defective.

The second and third sections of the law of 1795 regulate proceedings subjecting lands to execution for debt, that may yield certain rents and profits. The fourth section provides that "it shall and may be lawful for the sheriff or other officer to seize and take *all other* lands, tenements, and hereditaments in execution, and with or without writ of *venditioni exponas* make public sale thereof." After directing the mode of sale it proceeds: "But in case said lands and hereditaments, so to be exposed, can not be

sold, then the officer shall make return upon the writ, that he exposed such lands and tenements to sale, and the same remained in his hands unsold for want of buyers; which return shall not make the officer liable to answer the debt or damages contained in such writ; but the writ of *liberari facias* shall \*forthwith [290 be awarded and directed to the proper officer commanding him to deliver to the party such part of those lands, tenements, and hereditaments, as shall satisfy his debt, damages, and interest, from the time of the judgment given, with costs of suit according to the valuation of twelve men."

If under this section a *vendi.* could issue, instead of a *liberari facias*, it ought to contain the same certainty that would be required in the latter writ; for if the land did not sell, it ought to be delivered to the plaintiff under this writ; or if this could not be done without a *liberari facias*, then the *vendi.*, upon the return of which the *liberari facias* might issue, ought certainly to describe the land. Without this certainty of description, the land could not be delivered, and the cases decided in Massachusetts strictly apply.

7. But we insist that under this section, the *liberari facias* is the only proper writ; that none other could issue.

The statute authorizes a sale to be made with or without a *venditioni*, which means no more than that upon a writ of *levari facias* the officer may sell without returning the levy, and waiting for a *vendi.* to authorize a sale—and further, that if from any cause the *levari facias* should be returned levied without offering to sell, the sale may be effected upon a *vendi.* But if the land be once exposed to sale, then the writ of *liberari facias* shall issue to deliver the lands levied on to the plaintiff in payment of his debt. This is the plain and obvious meaning of the law; and that it is not confined to the case of mortgages is evident from this: the sixth section, directing proceedings upon mortgages, provides, that the mortgaged premises shall be sold and the money paid to the creditor; "but for want of buyers, to be delivered to the mortgagor or creditor, in manner and form as herein above directed concerning other lands and hereditaments to be sold or delivered upon execution for other debts or damages."

The return of the *fi. fa. et lev. fa.* in this case, is: "I have sold seven thousand acres, the residue remains unsold for want of bidders." This is the return that requires the *liberari facias* to issue. After it was once made, the authority to sell the lands, under the stat-

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ute, ceased. It could only be delivered to the plaintiff at a valuation. The reasoning of Chief Justice Tilghman, before quoted, 291] applies to the case and is \*unanswerable. Upon these grounds, the title of the complainant, Lindley, is essentially defective.

8. The act regulating executions, passed January 19, 1802, provides that a deed made by a sheriff "shall be acknowledged or proved, and recorded, as is or may be required by law, to perfect the conveyance of real estate in other cases." But this can not help the titles of the complainants. The repealing clause of that act only repeals the law of 1795, so far as may relate to judgments entered after the passage of the new act. And it adds: "but for the purpose of satisfying all judgments which have heretofore been entered, the same shall not be and remain in force, and for no other purpose whatever." No mistakes in practice, or mischiefs that may result, can warrant the court in disregarding the plain and positive terms of a statute.

The cases already quoted from the Pennsylvania adjudications are clear and full, that without an acknowledgment the deed is inoperative. Some difference of opinion may be found as to what objection may be taken, and when, against the acknowledgment, but none as to the fact of an acknowledgment being necessary. The cases in 2 Yeates, 458, and preceding, can not be regarded as authority. They were decisions by two judges only, made at *nisi prius*, so long ago as 1799, and have never been followed. The contrary is now the settled doctrine.

The deeds to Roads and Beaver were acknowledged by Krazter, in Clinton county, before the supreme court, May, 1822.

The proposition that a sheriff can acknowledge a deed so as to give it effect after his office has expired, after the return of the writ upon which the sale was made, and without notice to the judgment creditor, whose estate is thus to be defeated, is a very bold one. It is supported by a *dictum* in *Adam v. Thomas*, 6 Binney, 254. But it is repugnant to justice, and can not be adopted upon a single *dictum*.

But certainly this acknowledgment, if it can be made at all, can only be made in the county where the judgment was rendered, and where the process was returned. There must be some connection between the original proceedings and a subsequent act to be performed in court, and predicated upon them.

\*Mr. EWING, for the complainants:

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The judgment rendered in the general court of the territory, sitting at Cincinnati, was a lien on all the lands of the judgment debtor within the territory.

1. Though at common law, land could not be sold in satisfaction of a judgment, yet the rents and profits thereof, as they accrued, and the beasts *levant and couchant* thereon, were liable to be seized by *levari facias*, and sold in satisfaction of a judgment or recognizance. In case of a debt due to the king, and also where the ancestor had bound himself and his heirs, by bond or recognizance, and the heir held lands by descent from such ancestor, the land itself was liable for the satisfaction of the debt, and in each of those cases the lien took effect from the first day of the term in which the judgment was rendered. 2 Saund. 68, a. n. 1; 1 Plow. 441; 3 Coke, 12, a; Cro. Jas. 450; 2 Saund. 8, 9, n. 5; 1 Roll. 892; 2 Institutes, 395; 3 Com. Dig. 307; Bac. Abr., tit. Exec., letter A.

The several statutes *de mercatoribus* and of extent, though they varied the remedy against the lands of the debtor, in nowise altered the lien which judgments previously had upon such lands, but left them as at common law, the lien being still the same in its nature, commencement, and duration, but holding the property subject to the statutory disposal. 13 E. 1 Ch. 18; 2 Bac. Abr. 710; 18 E. 1 Ch. 3; 2 Bac. 688.

The law of Pennsylvania of 1705, of which our territorial law of 1795 is a copy, says nothing relative to the lien of judgments, nor had they a statute any more than in England, creating such lien. But the common law formed a part of the municipal code of Pennsylvania, and in giving their statute effect, the principles of the common law were brought in aid of its provisions, hence the lien of judgments upon lands has been uniformly holden the same in Pennsylvania as in England. 1 Dall. 450; 2 Dall. 158; 4 Dall. 214, 320, 450; 1 Yeates, 184.

The common law, in like manner, formed the basis of the code of the Northwestern territory. It was specially guaranteed by the ordinance of Congress for its government, and as specially adopted by the governor and judges in a statute from the Virginia code, declaring what law *should* be in force. Its strength [293 and efficacy was the same here as in England and Pennsylvania, and its effects on judgments must have been the same. The con-

clusion, therefore, is safe, that a lien upon lands was created by the rendition of a judgment.

2. But did that lien extend beyond the county in which the judgment was entered?

The court of the king's bench in England is a court of general jurisdiction, not confined in its sittings to any particular county or shire, but is emphatically a court for the kingdom. A judgment in this court binds the lands of the debtor throughout the kingdom from the time of its rendition. The *elegit*, and even the *fi. fa. without a testatum*, run from this court throughout the kingdom, in the counties Palatine, and even in the principality of Wales. *Jefferson v. Norton*, 2 Saund. 6, 28; 3 Rep. 12, a; 7 Rep. 38; 2 Saund. 68, n. 1.

The Supreme Court of Pennsylvania, whose organization we adopted, was modeled in many respects after the court of king's bench in England, and a judgment in that court was uniformly holden to be a lien throughout the state, until the principle was altered by an express statutory provision. *Prud.* 150; 1 *Yeates*, 183; 2 *Dall.* 158; 3 *Bin.* 7, 8.

The general court of the territory, like the court of king's bench, was not local, nor stationary—they were accompanied by their officers and their rolls, and wheresoever they might be in the territory they were a court. If a judgment were rendered while they sat in Cincinnati, the execution thereon might bear teste in Marietta, and be returnable to Vincennes. Their judgments were of record *in the territory*, not in a county, and we may safely conclude that the lien of their judgments was co-extensive with the territory.

It is said, however, that as the patent issued to John C. Symmes, the judgment debtor, after the rendition of the judgment, and the land was aliened by him to J. C. Symmes, Jr., before it was actually seized in execution, that the lien of the judgment did not attach upon these lands. This position they attempt to support by the decisions in Pennsylvania in the two cases of *Rundle and Margatroyd v. Etwin*, and *Calhoun v. Snyder*, 2 *Yeates*, 23; 6 *Bin.* 135.

294] \*But from the rules of the common law, and the decisions in Pennsylvania, to which even we resort for a guide in the construction of the act, it will be found that the judgment relied upon in the case at bar, was, from the time of issuing the patent,

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or from the date of the judgment, a lien upon the land in question.

If the general appropriation of the land by the act of Congress, and the registry and location of the particular tract by the holder of the warrant, vested a legal estate in the claimant before the issuing of the patent, and if the patent be merely evidence of the grant already perfected, as the authorities seem strongly to imply, this question is at once put to rest, and the lien, both by the rules of the common law, and by the laws of Pennsylvania, attaches from the time of the rendition of the judgment. But if this do not hold, the lien of the judgment, by the rules of the common law, commenced at the time of issuing the patent. To support this position, it were sufficient to advert to the form of their writ of *elegit* in the books of entries, which is always holden the best evidence of what the law is. It commands the sheriff that he "cause to be delivered to the plaintiff at a reasonable price and extent, all the goods and chattels of the defendant, saving, etc., and also the one-half of all his lands and tenements within your bailiwick, which the said defendant on, etc., on the day on which the judgment was rendered, *or ever after, was seized.*" 2 Wheat. 196; Lil. Ent. 576.

Lord Coke, in speaking of the statute of *elegit*, says, "*liberent et medietatem terræ debitoris;*" which, by construction of law, is of all he had at the time of the judgment given or at any time after. 7 Rep. 38.

In truth, this is a well settled principle of the common law, against which there is not in the English authorities one conflicting decision, nor in any of the United States, except Pennsylvania, and in the case of *Calhoun v. Snyder* it is expressly admitted by all the judges, except one, that the common law and the English authorities conflicted with their decision.

If, then, recourse is had to the principles of the common law, the lien of the judgment must be holden to have commenced from the emanation of the patent.

\*In Pennsylvania there is no court possessing an independent equitable jurisdiction; the powers and the jurisdiction of the two courts are vested in a court of law. Hence interests, both legal and equitable, are under the control of their courts of law, and an equitable estate in lands or goods may be sold on execution—and



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a judgment at law binds every kind of equitable interest in lands, etc., from the time of its rendition.

The courts of the Northwest territory were at this time modeled after the courts in Pennsylvania, and derived their power and jurisdiction from the same law. The same control over equitable property, which was vested in the courts of law in Pennsylvania, would, as it was necessary for the establishment of even a tolerable system of jurisprudence, be vested in the territorial courts on the adoption of the Pennsylvania law. 3 Bin. 4; Johns. Ch. 690.

Then even if it be holden that the grant, the registry, and the location of the warrant, vested no legal estate in J. C. Symmes, yet if this question be settled, either by the principles of the common law, or in conformity with the decisions of the courts in Pennsylvania, in either case it must be holden that the judgment was a lien on the lands before the alienation of J. C. Symmes, Jr.

II. As these lands were unimproved at the time of the levy and sale, an inquest to condemn them was unnecessary. This is the settled doctrine in Pennsylvania, and was so holden by the general court of the territory in the case of *Thompson v. Symmes*, in which the sheriff was ruled to pay costs for unnecessarily calling an inquest to condemn wild land. 2 Yeates, 154; Pur. Ab. 152, in note.

III. But it is said that a common *fi. fa.* without a *testatum* could not legally issue from the county of Hamilton to the county of Fairfield.

There is much confusion in the English authorities on this point, and it is difficult to extract from their various and conflicting decisions what the rule of the common law is respecting it. In many cases the *testatum* clause has been holden absolutely essential to the validity of the process; but in all it is agreed to be matter of strict law, and amendable at any time, even after suit, or writ of error brought. 3 Johns. 144.

296] \*In many of the older authorities, it is holden that when the *fi. fa.* issues from Middlesex (i. e. from B. R.), the *testatum* clause is unnecessary. I can not find anything relative to this clause in the old writ of *fieri et levare facias*, by which the rents and profits of the lands of the debtor were seized. But the writ of *elegit*, which took place in practice, has always been holden good from king's bench to a foreign county without a *testatum*.

4 Com. Dig. H. 137; Barnes, 196; 1 Lilly Ent. 129; Cro. Jac. 246; Imp. Pr. B. R. 391; 2 Dyer, 162, C.

Much of the apparent difficulty of the question is removed, and the authorities well reconciled, by the distinction mentioned by Sergeant Williams in his note to *Underhill v. Devereux*: "If an *elegit* be returned '*nihil*' in one county, the plaintiff may have a *testatum writ* of *elegit* to another county. But it is said that a writ of *elegit* must actually be sued out, and returned '*nihil*' by the sheriff, in order to warrant a *testatum elegit* to another county; for if several writs of *elegit* be awarded on the roll to different counties, and a *testatum elegit* is taken out, grounded on a supposed *elegit* issued to the county where the venue is laid, and returned '*nihil*,' when in truth no such writ was ever sued out and returned, the *testatum elegit* is erroneous: therefore, when there are several writs of *elegit* awarded on the roll, care must be taken that the writs of *elegit* only, and not *testatum* writs, be issued." 2 Saund. 68, a. a. (in note.)

It is not easy to render a substantial reason why the *testatum* clause should be absolutely essential in a *fi. fa.* to another county in any case, but it is clearly not necessary in a writ to be levied upon real property, as the *levari facias* or extent on a judgment in king's bench in England, or in the general court of the territory.

The lien of the judgment in those courts extended throughout the kingdom or territory, so as to bind at once all the real property of the defendant. The land, if the creditor elect to make it so by his writ (either the *fieri et levari facias* or *elegit*), becomes the debtor in law, and it seems but reasonable that an execution might go at once to satisfy the judgment supported by the lien in law, as well as to resort to the fiction of an original to the county in which the venue is laid. The one course is plain and direct, \*the other circuitous and based on fiction. Such is the law [297 in England in the case of the *elegit*, and the same reason will apply with equal force to the old writ of *fieri et levari facias*, for the land was equally bound to satisfy this writ with its rents and profits, as it is to satisfy the *elegit* by actual delivery; and I have no doubt that anciently this writ issued from B. R. throughout the kingdom without a *testatum*.

But the Supreme Court of Pennsylvania, under the 24th section of the act of 1722, issue the *testatum* when the process runs to a different county from that in which the judgment was rendered.

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The practice anciently adopted under this act is still adhered to, though, perhaps, on a view of all its provisions, it might well have borne a different construction. But if there could be any question on this point, as regards the law of Pennsylvania, every doubt is removed in the Northwestern territory by the different wording of their law of 1795, which was professedly adopted from the law of Pennsylvania. Pur. Ab. 149.

The 27th section of the judiciary act of Pennsylvania, which follows other sections, organizing their several courts, enacts that "when any judgment obtained in *any of the said courts* of this province, and execution returned by the sheriff of the proper county where such judgment was obtained, that the party is not to be found, or hath not goods, etc., and thereupon it is testified that he skulks, etc., it shall and may be lawful for the court who issued such execution to grant, and they are hereby required to grant, an *alias* execution with a *testatum*," etc.

In the 18th section of the territorial law, it is enacted that "upon any judgment obtained in any of the said *courts of common pleas*," etc.; the residue of the section is the same as that of Pennsylvania, above cited. The change of the phraseology of the adopted act (which is always supposed to spring from some sufficient motive) was to save the general court of the territory from the incumbrance of that wholly useless provision which could not but embarrass and delay the proceedings, and which had been a subject of dissatisfaction with the bar, under the act of Pennsylvania. The contemporaneous construction of the act by the judges 298] who adopted it shows its intent. Not a single instance \*can be found in which a *testatum* issued from the general court. In this case, then, the writ of *feri et levare facias*, without a *testatum*, was regular. 1 Yeates, 183, 184; 1 Dall. 27.

IV. It is further contended that the return of the writ is insufficient, and for this the sale should be avoided.

1. The general doctrine on this subject is very clearly stated in Fleetwood's case, 4 Rep. 67, where it is said, "That in case of a *liberate* or *habere facias seisinam*, a *capias ad satisfaciendum*, and generally of all other writs of execution, which are the most final process, on which no judgment is to be given, and no further process had, a return is unnecessary." But in case of an *elegit*, and when an *inquest* is necessary, the writ ought to be returned, that the court may judge of the sufficiency or insufficiency of that inquisi-

tion. "But it was agreed *clearly* that when no inquest was to be taken, but only the land to be delivered, or seizin had, or goods sold, etc., *which are but matters in fact*, these are good, although the writ is not returned." Apply this general doctrine to the act of 1795, and the following consequences are necessarily deducible from it:

1. In all cases when on inquest called the land is not condemned, but delivered over to the creditor on *an extent*, the writ, together with the verdict of the inquest, *must necessarily* be returned, for it is by *this*, and this alone, that the creditor holds the lands of his debtor.

2. And if the lands on which the *fi. fa.* is levied be *improved lands and held in fee*, so that an inquest is *necessary*, the writ and the verdict of the jury who condemned the lands must be returned, *to enable the plaintiff to sue out his venditioni exponas*, because in that case the *fi. fa.* is not the *most final* process.

3. But if the land levied on be wild and unimproved, or if it be an estate of uncertain duration, the *inquest is unnecessary*. The *feri facias* is the *most final process*, and no judgment is to be given thereon. Hence the sale would be valid *without a return*, for the acknowledgment of the sheriff's deed involves no *judgment* of the court; it is a matter of course, unless objected to, and no more a *judgment* than is an acknowledgment before a justice of the peace. The court, it is true, exercise a legal discretion in accepting or refusing such acknowledgment; but the return is not of course exhibited, nor is it the necessary basis of *\*the determina-* [299] tion of the court to accept or refuse the acknowledgment. The acknowledgment is never denied, unless the process of the court has been abused, or fraud or unfair practices taken place in the sale. Objections of this kind are substantiated, not by the return, but by evidence. 2 Yeates, 164; Pur. 152 (in note).

It would be idle to urge this objection to the acknowledgment of a deed when it is offered on the return day of the writ. The sheriff could amend *instantly*, and the objection is removed; here it is supplied by that which is at least equivalent to such amendment, the oath of the sheriff and other witnesses present at the sale, and it is competent so to supply it.

For the return of a sheriff has not the sanctity of a record, save when in his judicial capacity he returns an inquest; in all other cases the return may be made or amended after he goes out of

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office. It may be disproved or explained, and when wholly wanting it may be supplied by evidence. 4 Bac. 160; Dalt. Sh. 19; 2 Ld. Raym. 1072; 3 S. & R. 314, 317; 4 Wheat. 504.

2. But this argument concludes more than is necessary to support our case, for the writ was duly returned, and the return indorsed thereon is full and sufficient.

It is said by C. J. Kent, in the case of *Simonds v. Catlin*, that, "It is not requisite to the validity of proceedings on execution, that the writ should ever be returned, nor is it requisite, even if a return be made, that the sheriff should specify with certainty the particular lands sold, or the name of the purchaser; it would be sufficient to state, that of the lands and tenements of the defendant, he had caused to be made the debt and damages specified in the writ, as he was thereby commanded." 3 Caine, 63.

But it is said that in New York lands are sold as chattels; so are they in Pennsylvania after condemnation by the inquest, and precisely so in all cases where such condemnation is unnecessary.

But in Massachusetts the writ must be returned, and the return must be specific in its description of the property. True—because the lands are delivered over to the creditors, and he holds by *the return*, and not by deed.

**300]** \*The return must, therefore, contain all the requisites of a deed.

By the law of Massachusetts regulating executions, passed in 1783, it is enacted that where the judgment creditor can find no personal estate to his acceptance, wherewith to satisfy his execution, and shall think proper to levy the same on lands, the officer, after appraisement made, etc., shall set out the same by metes and bounds, and deliver seizin thereof to the creditor, etc., and such execution being returned, with the doings thereon, to the clerk's office, and recorded in the office for the registry of deeds in the county in which the land lies, shall make as good a title, etc. Under this statute, as under the statute of extent in England, the return must be special, as the creditor holds by the return; but the authority has no general application. 1 Laws of Mass.

V. It is in the next place objected, that at the time of the levy, J. C. Symmes had other lands which he had not aliened, and that all those lands should have been exhausted before these lands could be sold.

The only cases to be found in the book, in which this doctrine

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is laid down and supported, is that of Sir William Harbert, 3 Rep. 11, 6, and Clowes v. Dickison, 5 Johns. Ch. 239.

In Harbert's case it is said that the judgment creditor can be compelled, by *scire facias* or *audita querela*, to levy on the land still owned by the judgment debtor; and in Clowes v. Dickison, that on proper application in chancery he would be enjoined, etc. There is, however, no case either in law or equity (that I have ever seen), in which either of the courts have exercised that controlling power over the final process of a court of law; and it does seem to me, that if the authority should be ever exercised, it must be on application in chancery, and not at law. Admitting the general position, that the purchaser has a right to direct the execution of the judgment creditor on other lands of the debtor, yet many circumstances may supervene to destroy that right, and give to other third persons a permanent equity against it. Suppose this case, and it is one of ordinary occurrence: A. recovers judgment against B., who is seized of two parcels of land, one of which is sufficient to satisfy the judgment—\*B., by volun- [301 tary conveyance, aliens part of the land, and afterward C. recovers judgment against him—A. levies his execution on the part of the land aliened, and the alienee seeks to turn him on the other part of the lands of B. This case, when so many independent interests are involved, could not be settled equitably on motion. And on *scire facias* or *audita querela*, sued out by the alienee against A., in what manner could C. come in and enforce his equity; for an equity he certainly has, paramount to that of the alienee. And in the case supposed, had the elder judgment creditor voluntarily resorted to the land not aliened, equity would interfere in behalf of the younger judgment creditor, and compel the elder judgment to take first the land on which he had the sole lien, or to assign his claim to the younger judgment creditor.

It is said by Chancellor Kent, in the case of *Cheesboro v. Mil-lard*, 1 Johns. Ch. 412, that, "If a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditor thrown on the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded on natural justice, and I believe recognized in

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every country having a cultivated system of jurisprudence." The doctrine, which runs through all the books of equity, and the numerous cases which come within its principle, show uniformly the impropriety of exercising the jurisdiction here claimed on the hearing of a motion between third persons in a court of law.

The doctrine laid down by Lord Coke, in Sir W. Harbert's case, has never been sanctioned by any *judicial decision*, and however correct it may be in theory, can not be carried into effect, except by a court of equity; and at least, as respects the mode of enforcing the remedy, is not the law of the land at this day. Indeed it is a power which courts of law could not exercise without doing in many instances the most flagrant injustice. In Dickey's case, reported in 1 Hall's Journal of Jurisprudence, 69, it was said by Judge Smith, "Suppose there is a general judgment affecting 302] different \*estates, or distinct tracts of land belonging to the defendant, the judgment creditor may select his object and direct a levy to be made of any one of them only, and although the estate levied on may have been sold or conveyed by the defendant subsequent to the judgment, and the remaining lands may be sufficient to satisfy all the liens, yet the court can not interfere. We have not the powers of a court of chancery in such cases, which is perhaps to be lamented. We can not marshal, or apportion the assets. The party, therefore, must look to his indemnity, or covenants of warrantee, or where several are equally liable, and the whole is levied from one, he must sue for contribution—we can not help him by our summary powers." If this doctrine be correct, the defendants in the present case could not have objected this to the sale on motion, timely made in the court of law, nor could they have urged it against the acknowledgment of the sheriff's deed. But if I should be incorrect in this, and if the purchaser could at law control the judgment creditor, and direct his execution, he must do so on principles purely equitable.

When third persons become the purchasers at sheriff's sale, the equity is clear against such an objection. *They* have no reason to inquire into the situation of the judgment debtor, either as to his lands or goods. If he had title to the land levied on, and offered for sale, at the time of the rendition of the judgment, it is sufficient. No one would be safe in purchasing at sheriff's sale if these *latent* equities, unknown and unexpected, could, after the payment

of the purchase money, spring up and be enforced against the purchaser.

But it is said that the objection can be taken any time before the acknowledgment of the deed, and until the deed is acknowledged, the purchaser should not pay the purchase money. This was not the doctrine holden at that day, and indeed if it had been so, it would have rendered all sales at a distance from places where the court was holden impracticable. The sheriff could not return his writ until the money was paid. The deed could not be acknowledged until the purchase money was shown to have been paid either by the return of the writ, or otherwise. The consequence would be that no sale could be closed unless the \*sheriff [303 and the purchaser should make a pilgrimage together to the next general court, whether distant one hundred or five hundred miles, there to settle the transaction. This would be too serious an incumbrance on sheriff's sales, considering the small value of land in the territory at that time. This is not the course that was pursued in *those days*, and it would be unwise now to establish a new rule of practice for time so long gone by, when the situation of the country is since so materially changed.

The doctrine in Pennsylvania supports our position to the full extent, and gives the *bona fide* purchaser at sheriff's sale, on application to acknowledge his deed, all the privileges which, by the common law, and by the decisions of the courts in other states, are given to one who holds by *sheriff's deed fully executed*. Judge Smith, in Dickey's case, above cited, speaking of the general doctrine on the subject of sheriff's sales, says: "At common law, after a sale by the sheriff, if the judgment be reversed by a writ of error, the plaintiff shall not have restitution of the goods, but the value of them for which they were sold. If the law were not so, there would be no buyers, and of consequence, no execution done, and the sheriff sells by authority of law, but the sale must be without fraud. So the regularity of the sale can not be questioned against a purchaser under a sheriff's sale in New York. And in the case before Lord Woodwicke, when one was in custody on a *ca. sa.*, and yet the sheriff seized a leasehold estate for ninety-nine years, and sold it after the return day of the writ had expired and without a *vendi*, the sale was held good, though the whole proceedings were irregular; for the writ not being void, the sheriff had an authority under it to convey a title; otherwise it would be very hard if it should be



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at the peril of a purchaser under a *fi. fa.* whether it should be regular or not." He further proceeds to distinguish the case of a sale on execution from a sale under the order of a court of chancery, and adds: "In case of sales on execution the lowest is never called upon to approve or confirm. The sheriff sells by authority of his execution, issued of right at common law, and not depending upon any discretionary power of the court. "*Where he sells he may receive the purchase money and make a deed to the purchaser, 304]* in whom an interest is vested independent\* of the approbation of the court. All that is required is that the sheriff shall acknowledge his deed, and then when he comes in to acknowledge it, complaints may be made of *fraud and unfair practices of sale.*" 5 Rep. 90; Cro. Eliz. 278; Cro. Jac. 246; 8 Johns. 361.

In the case of *Welch v. Murray*, 4 Yeates, 196, an objection was taken to a *vendi.* on which lands had been sold and the judgment creditor became the purchaser. The *vendi.* was returned to the September term, 1804, and at the December term in the same year, and *before the sheriff's deed was acknowledged* a motion was made to set aside the *vendi.* for some alleged irregularity; the court held the writ irregular, but *the delay in the application*, among other reasons, forbid them to set it aside. In *Cochran et al. v. Cummins*, there had been a delay of two years, and the court, on this ground alone, refused to inquire into the irregularity of the proceedings. 4 Yeates, 136.

So in the case of *Clowes v. Dickinson*, though Chancellor Kent held the proceedings manifestly irregular and inequitable, yet he refused relief because there had been a delay of four years, and a contract of sale of a part of the premises to an innocent purchaser. 5 Johns. Ch. 244.

In numerous other cases similar adjudications have been made. 11 Johns. 516; 16 Johns. 573; 13 Johns. 557; 2 Tidd, 271.

In the cases at bar there have been fair and regular sales. The purchase money paid, deeds executed, a lapse of twenty years, accompanied with possession in the purchasers. Large and valuable improvements, and repeated transfers of the premises, before this *equitable* objection is brought forward to set aside the sale.

VI. With respect to the tract claimed by Lindley, two other objections are urged as arising on the process: 1. That the lands are not described in the *venditioni exponas*; and 2. That the *alias*

*vendi.* was irregular, and instead thereof a *liberari facias* should have issued.

1. There is no rule or principle of law which requires that the property to be sold should be particularly described in the *venditioni exponas*, nor can I perceive any valuable object which is to be obtained by so describing it. The writ is directed to the sheriff, commanding him to sell the lands on which he has levied. He does not stand in need of information as to the lands [305] on which he has levied, and the sale itself rests for its validity on the original *feri et levare facias*, and not on the *vendi.* According to the most approved precedents neither the *venditioni exponas*, nor *distringas nuper vice comitem*, describes the goods and chattels which they command to be set to sale. Indeed, it were wholly unnecessary. 2 Saund. 47, L. & M., note 2.

They command the sale of all the goods, etc., seized in the hands of the officer. And both writs are intended to hasten the officer, who has seized the property, and has it in his possession or power to set it to sale. The *vendi.* in question is substantially pursuant to the precedent in 2 Saund. 47, M., in note. It seems to me entirely unexceptionable.

2. That clause of the statute which requires the *liberari facias* to issue in case the land will not sell upon a *vendi.* relates solely to mortgaged premises, and has never been construed, either in Pennsylvania or in the territory, to apply to any other lands. This will satisfactorily appear on a full examination of the statute and by reference to the many cases in which sales have been made, on the *alias* and *pluries venditioni.* Indeed in the case at bar it had not yet been proved that the land would not sell on the *vendi.*, for it seems by the return that it was twice struck off to bidders, who, on tender of the deed, refused to pay the purchase money. There must at least be one opportunity for the land to sell without the interference of puffers (who may be employed by a defendant to defeat a sale) before the plaintiff should be compelled to take the land at its appraised value on the *liberari facias.* Here, it seems, there was none until the last offer, when the land was sold to the purchaser under whom Lindley claims.

IX. The deeds from the sheriff to Scofield and Vanmetre, under which Roads and Lindley claim, were acknowledged in the Supreme Court, sitting in Clermont county, at the May term, 1822, by Samuel Kratzer, the sheriff who executed the deeds. This was

in strict accordance with the requisitions of law, as our Supreme Court is made the legal successor of the general court of the territory. The former observation touching the jurisdiction and character of the general court show that their judgments were **306]** not of any place, and consequently it is not essential that the acknowledgment should be had in the county in which the court was sitting when such judgment was rendered. It will be seen by inspecting the record that the writs of execution were made returnable to a different county, so that if the acknowledgment had taken place on the return day of the writ, it might not have been at Hamilton county.

If the acknowledgment be in the same court it is sufficient. The deed for the south half to Abraham Kinney has no acknowledgment indorsed, but we claim it may be used in evidence in support of our title, on the following grounds:

1. At the time of the execution of this deed an acknowledgment in open court was unnecessary. The act of 1795 speaks of the acknowledgment of sheriff's deeds in open court; but the act of 1802, which took effect previously to this sale, repealed the former act, leaving it in force only for the purpose of satisfying such judgments as had been obtained under its provisions, and "*for no other purpose whatever.*" 7 T. L. 35, sec. 23.

Each of those acts, it would seem to me, has two distinct objects or purposes, for which it provides: 1. The satisfaction of the judgment. 2. The securing the purchaser in the possession of his property. The first is between the creditor, the debtor, and the sheriff; the second between the sheriff and his purchaser. The rights of the creditor and debtor become fixed and vested under the form which may be given them by the law in force at the time of the rendition of the judgment; and though the legislature might, perhaps, have power to change them, yet such would not be a proper subject of legislation. But the rights of the purchaser do not vest until the sale, and the legislature may, at any time previously thereto, vary or modify the form of security which he is to receive for his purchase. It would then have been correct for the legislature to change the law, as far as it respects the acknowledgment of the deed, but incorrect so far as touches the rights of the creditor in the satisfaction of the judgment.

The phraseology of the law, "*for no other purpose whatsoever,*" is that of strict limitation, intended to confine the previous term

(*satisfying such judgment*) in its most narrow \*and limited [307 sense. These words of the act strongly favor our construction, but the reason and object of the law much more.

The territory over which the general court had jurisdiction was extensive. Vincennes, Detroit, Warren, and Steubenville were among the county seats in the more populous counties. It was unreasonably burdensome to require of the sheriff who had sold lands in Vincennes or Detroit, on a judgment in the general court, to attend and acknowledge the deed in Cincinnati or Marietta, to which place the writ must probably be returned. This evil was remedied by the law of 1802, if we give it the construction which the words in their restrictive sense seem to require; while at the same time no vested right is assailed or abridged. But if such acknowledgment were essential to the validity of the deed, the presumption of law arises, from length of time, that it was so acknowledged.

The acknowledgment need not appear upon the deed itself, but may be a matter of record in the court in which it was taken; the fact, then, that a copy of the deed without an acknowledgment is produced, does not militate against such presumption. A matter of record may be presumed. In the case of the Mayor of Kingston, upon *Hull v. Homer*, it is said, "That if a foundation can be laid that a *record* or deed existed, and was afterward lost, it may be supplied by the next best evidence to be had, or if it can not be shown that it ever existed, yet enjoyment under a title, which can only be by *record*, is strong evidence to be left to the jury that it did once exist. In *Turner v. Sadler*, a grant which must be of record was presumed, and in *Hesselden v. Broadney*, a recovery which is a conveyance of record was presumed. 6 Bin. 255; Cow. 108, 109; 1 Ray. 26; 2 H. & M. 370; Phil. Ev. 124; Term. 159.

But it may be said, that such acknowledgment is *not probable*, and therefore can not be presumed.

In the case of *Eldridge v. Knott*, the court of B. R. referring to the case of the Mayor of Kingston, upon *Hull v. Homer*, says, "it is not in such case that the court *really thinks* a grant has been made, because it is *not probable* that a grant should have existed without its being upon record, but they *presume the fact*, for the purpose, and from the principle \*of quieting possessions." So also [308 says the master of the rolls, in the case of *Holleeny v. Walker*, "Presumptions do not always proceed on a belief that the thing

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presumed has actually taken place, *but merely for the purpose, and on the principle of quieting possessions.*" And Lord Erskine, Chancellor, in the same case, says, "It is said you can not presume unless you believe. It is because there are no means of creating belief, or disbelief, that such general presumptions are raised, on subjects, of which there is no record or written muniment; therefore, upon the weakness and infirmity of all human tribunals, judging of matters of antiquity, instead of belief (which must be the foundation of judgment upon a recent transaction), when the *circumstances are incapable of furnishing anything like belief*, the legal presumption holds the place of particular and individual belief." Cow. 214; 12 Ves. Jr. 222, 266.

This doctrine is reiterated and fully sanctioned by the Supreme Court of the United States, in the case of *Provost v. Gratz*. Indeed, it is the settled and undisputed law of the land at this day; and time has elapsed since the sale, sufficient to raise the legal presumption in its favor. It is said, in the case of *Richard v. Williams*, that, "in general, it is the policy of courts of law to limit the presumption of grants to periods, analogous to the statute of limitations, in cases where the statute does not apply. But where the statute applies, it constitutes ordinarily a sufficient title, or defense, independently of any presumption of a grant, and therefore it is not generally resorted to. But if the circumstances of the case justify it, the presumption of a grant may as well be made in the one case as in the other, and when the other circumstances are very cogent and full, there is no absolute bar against the presumption of a grant within a period short of the statute of limitations." In the case at bar, twenty years, the period to which all real actions are limited by the act of January, 1804, had elapsed after the sale, and previously to filing the bill, and here, as the statute of limitations, for various reasons, can not apply, the case falls properly within the principle of legal presumption. 6 Wheat. 504; 7 Wheat. 110.

The obvious policy, which gives rise to statutes of limitations [309] and legal presumptions, is modified and varied by \*the particular situation of the country where it is applied. In England, the great mass of the population has for ages past been fixed and stationary, and the records of their courts preserved in safety.

Within the bounds of the Northwest territory, the population has been fluctuating, the hardships and diseases incident to the coun-

try, together with the spirit of emigration, in a few years, sweep from each place all its early inhabitants; and the earlier records of our territorial courts have been almost lost. So far, then, as relates to the proof of an ancient transaction, by living witnesses or the records of the country, the lapse of time operates less powerfully in England than here. But the contrast is still more striking when viewed with respect to situation and the feelings of the occupant. There, if at the end of a long series of years, he be evicted from his possession by an adverse claim, he is merely deprived of that which he has long enjoyed. He has not been injured by the length of his possession, for in England real property is a constant source of revenue and power. But here it is a burden until the labor of the occupant renders it valuable; and if after this it is wrested from him, it is not the property alone which has been lost, but the strength and sinews of the man, which were wasted to render that property susceptible of enjoyment. Hence our legislature early adopted a period of limitation as respects real actions, much shorter than is established in England; and the same reason applies with equal force to those legal presumptions which arise independent of the statute.

3. But again—this deed, even under the law of 1795, may be read in evidence without an acknowledgment. In *Morehead v. Pearson*, 2 Yeates, 458, a case in which this point arose and was expressly decided by the court, it is said, "That the usage of acknowledging sheriff's deeds of lands in the term succeeding the sales, is certainly attended with many conveniences, and ought to be followed. It gives the debtor and creditor an opportunity of making their complaints on a day certain, which are soon heard and determined, and much time and expense are saved thereby. The words of the act, however, are only directory, and do not invalidate a sheriff's deed for want of an acknowledgment in court. Such acknowledgment does not appear to \*be essentially [310 necessary in all given cases. Suppose the sheriff to execute the deed and receive the money on one day, and die or become incapable of acknowledging it afterward, it would be hard to say that the deed was defective on that account, and that a new sale must be had. On the whole, we think the present deed may be supported *without the usual acknowledgment*, after so great a lapse of time [23 years], and no objection made to it by the debtor, but in its operation it is subject to every exception which may be had against a

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sheriff's deed on its acknowledgment being tendered in open court." If the reasoning of the court in the above cited case be correct, and there be any cases in which the acknowledgment in open court can be dispensed with, it must apply to cases like the present, of sales in counties far remote from the place where the court is holden, in which cases an acknowledgment becomes in a great measure impracticable, and frequently impossible.

Hence in cases like this, arising in the remote counties in the territory, no acknowledgment in open court has ever been had.

This authority is not only supported by reason, but (in the extended territory) by the convenience, and even by the *necessity* of practice; it is supported, also, by an unvarying custom during the existence of the act of 1795.

If it be sanctioned by the court, we have a legal and available title to all the lands in question, which can be met and defeated by that kind of evidence alone, which would defeat an application for the acknowledgment of a sheriff's deed. That this can be defeated only by fraud, or an abuse of the process of the court, has been already shown by the authorities above cited.

We stand in every respect fully and fairly upon the ground of purchasers at sheriff's sale, claiming under a sheriff's deed, on which no judgment of a court has been passed.

It has been the policy of courts from the earliest ages of our judicial history, to sustain and support those titles which are acquired under their process. It is said by Lord Coke, 8 Rep. 97, speaking of a sale of a term of years, "If the sale of the term should be avoided, the vendee would lose his term and money too, and there-  
311] upon great inconvenience \*would follow; that none would buy of the sheriff goods and chattels in such cases, and so execution of judgments (which is the life of the law) would not be done. 8 Rep. 97; 1 Yelv. 179.

In a case in chancery, (1 Ves. Sen. 195), where one was in custody on a *ca. sa. a fi. fa.* was issued against the same person on the same judgment, and the sheriff seized a leasehold estate for ninety-nine years, and sold it after the return of the writ had expired, and without a *vendi*. The sale was holden good, though the whole proceedings were *irregular*; for, says Lord Hardwicke, "The writ not being *void*, the sheriff had an authority under it to convey a title, otherwise it would be very hard if it should be at the peril of a purchaser under a *fi. fa.* whether the proceedings were regular

or not." In 2 Schoales & Lefroy, 566, and other cases there cited, the same doctrine is held in relation to sales under the order of a court of equity. 9 Ves. 37.

In Jackson v. Bartlett, 8 Johns. 366, it is said, on the trial of an ejectment, the question of the regularity of a *fi. fa.* under which the land was sold, could not be raised. "It is not (say the court) for the present defendant to question a purchaser's title under such execution; it was a good authority for the sale." 16 Johns. 575; 11 Johns. 516.

So in the case of Young v. Taylor, 2 Bin. 227, Yeates J., in delivering the opinion of the court, says, "For it has often been decided, on the trial of an ejectment, instituted by the sheriff's vendee, the court will not inquire into the formality of the proceedings on which the sale was founded, it amounting, in fact, to an attempt to reverse the *process* of one court in one cause, by another court collaterally in another cause."

So also in the case of Little and others v. De Lancey, 5 Bin. 273, it is said, "Admitting that irregularities appear on the face of the different executions, and such is certainly the case, they are not void if founded on a judgment, but only voidable. The vendee, under a sheriff's sale, is protected by the common law, upon strong grounds of substantial policy, when he is no party to the proceedings."

In 3 Bibb, 216, it is holden that if the sheriff sell, without *advertising*, the sale will *be good*, and the party injured will have his redress against the sheriff.

\*And in Wheaton v. Lintons, 4 Wheat. 507, Justice Johnson, [312 in delivering the opinion of the court, sums up the doctrine in these words: "The purchaser (at sheriff's sale) depends on the judgment, the levy, and the deed; all other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all to the writ, is immaterial to the purchaser, provided the writ was duly issued, and the levy made before the return."

But again—the whole proceedings have been in strict accordance with the general practice of the courts at that time, and few, or none of the sales, made under the act of 1795, could be supported if this is held invalid.

It is holden, in 5 Cranch, 22, that "the practice under a law will



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be respected, even though on a strict construction, it might be considered erroneous—for otherwise, much mischief might ensue, and many titles be unsettled.” And if there is any case, where the maxim “*communis error facit jus*” can have a proper and legitimate application, it is in cases like the present, where the error (if any there be) has been committed by officers, constituted by the courts, and acting under their supervision and control. 1 Ser. & R. 102; 2 Bay. 441.

On the whole, it seems to me that no sufficient objection has been shown to shake the title of these complainants, after twenty-one years’ acquiescence, and about twenty years’ peaceable possession—more especially, as the decision in the present case, will involve the fate of many thousands of real property within the bounds of the territory.

By the COURT:

It has been settled that the judgment of a court of record operates as a lien upon the real estate of the defendant. Whether this is a maxim of the common law, or was first introduced by the statute of Westminster, 2, is of no importance in this case. The law of 1795, declaring what laws shall be in force, adopts both the common law, and all statutes of the British Parliament, made in aid of it, prior to the fourth year of James the first. In either case, this law established the principle amongst us, and it has been acted upon from the commencement of the administration of justice in the territory.

**313]** \*It is equally well settled that this lien is co-extensive with the territorial jurisdiction of the court that renders the judgment. The general court of the territory exercised jurisdiction, and sent its process, original and final, into any county within the territory. The judgments rendered by it were of consequence a lien or charge upon all the lands owned by the defendant, and situate anywhere in the territory. This, it is understood, is not controverted.

The legal title to the lands in dispute was not vested in the defendant when the judgment was rendered, and before the levy was made, he conveyed them to one of the present defendants, under whom the other claims. Under these circumstances, it is maintained the judgment, upon which the execution issued, never attached as a lien upon these lands. And this is the opinion of the court.

The complainants' counsel assert that the doctrine is settled differently in England, and in some of the States of the American confederacy, and have adduced authorities in support of this position. But these are all rather inferences than direct adjudications.

In the case of *Calhoun v. Snyder*, 6 Binney, 145, the point is very fully and ably examined by two of the judges. The force of the authorities, cited in support of the opposite doctrine, is much weakened by this exposition. And the decision of the court, in that case, is placed upon such clear and satisfactory grounds, that we feel no hesitation in adopting it. The judgment, in the case of *McLure v. Symmes*, rendered at March term, 1800, did not attach as a lien upon the lands in dispute, the legal title to which was obtained by the debtor in April following, and conveyed in January, 1801, before execution levied.

The lands in controversy were located by the debtor in February, 1800, and though not patented until April, the counsel for the complainants contend that the act of Congress, under which the title is derived, invested the locator with the legal title before the emanation of a patent.

It was certainly competent for Congress to declare what should be done to invest those deriving title to lands under the laws of the United States with the complete legal title to such lands. They provided that this shall be done by granting a patent to those entitled. Whatever right a party may have previously acquired, he is not invested with the complete perfect title until this patent is issued. The patent is not the foundation, but the consummation of the title. Until it emanates, the legal power of the government over the subject is not at an end. Upon its emanation that power terminates, and the right of the grantee is perfected. Symmes, therefore, held no legal estate, which could be bound by a judgment, until the patent issued.

It is further insisted that whatever interest, legal or equitable, Symmes held in these lands, under the registry and location made in February, 1800, that interest was bound by the judgment in question. And this is said to be conformable to the decisions in Pennsylvania, where the principles of jurisprudence are the same that prevailed under the territorial government in 1800. The liability of equitable interests in land, to be seized and sold upon execution as land, has never been recognized by this court, as existing either under the territorial or state governments. That

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it can not now be so seized and sold, is settled both by judicial determination and legislative enactment. If these equitable interests ever could have been taken in execution at law, they must have been seized in the character in which they existed, not in a different character. This was not, and could not be done in the case before the court. The equity, whatever it might be considered, merged in the legal title before the levy made. And, as the judgment could not attach as a lien upon the after-acquired legal title, it could not operate upon an equity extinguished by, and merged in that title. There is no principle, upon which it can be held, that a judgment may bind an interest which can not be seized and sold to satisfy it.

There is no force in the objection that an inquest was not held upon the land before the sale on execution.

The second and third sections of the law of 1795, subjecting real estate to execution for debt, provide for the case of land yielding rents or profits. The fourth section embraces the case of "*all other lands*," that is, lands *other* than those which yield rents and profits. It requires no inquest, but directs a sale "*with all convenient speed*." If lands, only liable to be sold as directed by the 315] second and third sections, should be sold under the fourth, it would be good reason for setting the sale aside, upon proof of the fact. But as the law authorizes a sale, without inquisition, the court must presume the sale rightfully made, until proof is adduced that it is not.

It is no objection to the process that it was not a *testatum*. The county of Fairfield was as fully within the jurisdiction of the court, with respect to process, as the county of Hamilton. The *testatum* is only required where a court issues process to a county in which it has no general jurisdiction.

With respect to the fact that the debtor owned lands not aliened, at the time of the execution, it can not be given in evidence to defeat a sale upon execution. When the sheriff's sale is completed, by payment of the money and delivery of the deed, the title of the purchaser ought not to be affected by a circumstance of this character. To permit this, might introduce great mischiefs, and would render purchases under execution too insecure. Upon return of the execution, is the proper time to settle all questions of this kind. If a sale were pressed on before the return of the execution, so as to deprive a purchaser of an opportunity then to be

heard, he might obtain an injunction to stay it for that purpose.

The objections that the return upon the *fi. fa. et lev. fa.* is insufficient that a *liberari facias*, and not a *vendi.*, ought to have issued, and that the *vendi.* does not sufficiently describe the lands to be sold, have not been considered and decided by the court, because it is not necessary now to decide them, and they may possibly be hereafter presented for consideration in some other form. There is one objection, which the court consider fatal to the complainants' claim, as now presented. None of the deeds have been acknowledged in the manner prescribed by law, and without such acknowledgment they convey no title.

The fourth section of the act of 1795, after directing the manner of sale upon execution, proceeds, "and upon such sale, the sheriff or other officer shall make return thereof, indorsed or annexed to the said *levari facias*, and give the buyer a deed duly executed and acknowledged in court for what is sold."

\*It is obvious that the provision requiring the acknowl- [316] edgment to be made in court was not meant as a mere idle ceremony, nor could it be intended as evidence of the execution of the writ, which must be returned with the sale indorsed or annexed. The requisition is plainly made for the just and useful purpose of giving the defendant an opportunity to object to the regularity or fairness of the sale. As to these matters, without this provision, he could have no day in court, and might claim to make his objections to the sale in a subsequent suit with the purchaser, which would not only be inconvenient, but might operate great injustice. This acknowledging the deed in court, conduces to the security of all parties, and is a substantial part of the transaction, which can not be dispensed with.

The case from 1 Sergeant & Rawle, 54, is full in point, as to what is the doctrine in Pennsylvania. It is of higher authority than the *nisi prius* cited from Judge Yeates' reports, not only because it is a much later decision, but because it was made by a full court, upon mature deliberation.

These deeds are not aided by the statute of 1802, regulating executions; that act, in terms, extends only to judgments rendered after its passage. For the purpose of satisfying judgments then rendered, it left the law of 1795 in full force. One of the means of satisfying these judgments was by the sale upon execution of

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the debtor's lands. This sale could only be conducted and perfected under the provisions of the law of 1795. These require the sheriff to acknowledge the deed in open court; if this is not done, the deed is inoperative.

After the time that has elapsed, the counsel for the complainants suggest that the acknowledgment of the deeds ought to be presumed. His argument on this point, though ingenious, is not satisfactory. The deeds are produced, and the acknowledgment, which constitutes an essential part of their execution, does not accompany them. A grant may sometimes be presumed; but if it be produced, and is defective, nothing can be presumed to aid that defect. The circumstances of the case rebut the presumption contended for. One of the deeds is proved by a subscribing witness, the other two have been recently acknowledged by the 317] \*grantor. These facts show the clear understanding of the parties, that the acknowledgment required by law was never made.

The two deeds acknowledged in the supreme court of Clinton county derive no additional validity from that act.

The first legislature held under the state government abolished the general court. The twenty-sixth section of the act of April 15, 1803, transferred to the Supreme Court "cognizance of all judgments, causes, and matters whatsoever, whether civil or criminal, that were then pending, undetermined or *unsatisfied* in the general court." It also provided that all writs issued out of the general court should be continued over, of course, to the first session of the supreme court to be holden in the respective counties.

Under this law, the writ of *fi. fa. et lev. fa.*, then in the hands of the sheriff of Fairfield county, was returned to the supreme court of Hamilton county, from which the subsequent processes issued. If, then, these deeds can be perfected by any after acknowledgment in the Supreme Court, that acknowledgment can only be made in the supreme court of Hamilton county, where the judgment is. The object of the acknowledgment is to give the parties an opportunity to contest the regularity of the sale, and this can not be done unless the judgment, and process upon which it is made, are before the court. It would be absurd and unreasonable to send the parties to any other county to make this investigation. Nothing short of a positive law, authorizing the acknowledgment to be taken in any county, would warrant the court in

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receiving it in any other than that where the judgment, execution, and return are of record.

The foundation of the bills in all the cases is, that the complainants each have a legal title. But the court is of opinion that the sheriff's deeds, under which they severally claim, are all defective and inoperative; the bills must therefore be dismissed.

Judge BURNET, having been attorney for McLure, upon whose judgment the lands were sold, did not sit in this cause.

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\*WILLIAM JACKMAN v. J. H. HALLOCK AND OTHERS. [318

*Vendor's Lien—Execution against Lands on Judgment of Justice.*

The assignee of a note given for purchase money of land has no lien.

Equity is not subject to lien of judgment.

Award of execution against land upon a justice's judgment is no lien before levy.

THIS was a bill in chancery to charge certain land with the payment of a balance of the purchase money due upon it. It was adjourned for decision here from Jefferson county, and the facts of the case were these:

The land in question was sold to Vandike by Elliot; part of the purchase money paid, but no deed given. Vandike sold to the defendant Decker, and an arrangement was made, by which Decker gave his notes to Elliot for the balance of purchase money due from Vandike, and Elliot gave to Decker a bond to convey. Two of Decker's notes to Elliot, for the sum of fifty dollars fifty cents each, being the balance of the purchase money of the land, were assigned by Elliot to the complainant Jackman. Upon these notes, Jackman, as assignee, brought suit against Decker before a justice, and recovered judgment. Execution issued and returned no goods.

Jackman then filed a transcript, and obtained a *sci. fa.* from the

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court of common pleas, to show cause why execution should not issue against Decker's lands. At August term, 1821, execution was awarded against the real estate of Decker. At this time, Elliot had not conveyed to Decker, and he had no real estate except his interest in the land in question.

At August term, 1821, suit was brought by Decker against Elliot upon the conveyance bond, in which the defendant Hallock was attorney for Decker. At the December term, 1821, the counsel for Decker tendered a deed for the land from Elliot and wife to Hallock, who refused to take it, because it did not sufficiently describe the lands.

Decker, becoming indebted to Hallock for fees as counsel, and for moneys advanced to secure the payment, and also to secure him for becoming his bail upon an appeal bond, in January, 1822, assigned to him Elliot's bond, then in suit. Hallock gave Decker a memorandum of the object of assigning the bond, and a stipulation to reconvey when paid and indemnified. At the time of this transaction, Hallock knew that part of the purchase money 319] due to Jackman \*upon the assigned notes was unpaid, and knew of the legal proceeding upon these notes.

At March term, 1822, a deed from Elliot and wife, properly describing the land, was offered to Hallock for Decker, but was not accepted. At this term the suit of Decker v. Elliot was discontinued. This suit was commenced in April, 1822, against Hallock, Decker, and others, praying a sale of Decker's equitable interest in the land, and a preference in payment of the judgments for Jackson upon the notes taken for purchase money. The court directed a sale of the property, and that the proceeds be brought into court. The question how they should be distributed was reserved for decision here.

Three questions were submitted for decision:

1. Whether the assignee of the notes, given for the purchase money of land, can enforce, in equity, the original lien of the vendor against the land?
2. Whether Jackman's judgment attached as a lien upon Decker's equitable interest in the land?
3. Whether, when execution is awarded by the court of common pleas against real estate upon a judgment rendered by a justice, a lien upon land attaches before levy made?

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WRIGHT & COLLIER, for complainant, submitted the case without argument.

HALLOCK, on the other side, maintained:

That the lien of the vendor for purchase money, though a well settled rule in equity did not extend to third persons. Upon a careful examination of the chancery reports, digests, and elementary writers, no dictum could be found suggesting such a doctrine. In Sugden on Vendors, 392, 398, and 2 Maddox, 105, it is laid down that the principle does not extend to third persons in general terms; but the cases referred to do not resemble this. He also cited 15 Ves. 330, and 4 Wheat. 225, as containing a full exposition of the doctrine in respect to the lien of a vendor.

By the Court:

The vendor's lien for purchase money is founded upon an implied trust between the vendor and purchaser. The purchaser is held in equity to be the trustee of the vendor, receiving the contract or conveyance to hold it for the use of the vendor, until the purchase money is paid. The trust attaches to the land, and follows it into the hands of a subsequent purchaser with notice, upon the universally received doctrine that he who purchases a trust property, with notice of the trust, is bound by it. But this trust does not and can not attach to notes given for the purchase money. It is an equity between the vendor and vendee, which the notes can not affect, but which exists in the same character, whether a note be given or not. This equity arises to the vendor for his own safety, but it can not be transferred to another. No law has made it the subject of conveyance or assignment. It can not follow the notes, because the assignee takes in them a legal interest, and the assignment does not purport to transfer and could not transfer an equity existing independent of them. The notes for purchase money are evidences of debt without any reference to the consideration for which they were given; the vendor's lien is a substantive right, distinct and separate from the notes. The vendor may unite them by keeping the notes in his own hands; but he can not transfer both to his assignee of the notes, neither at law nor in equity. A majority of the court are of opinion that the complainant can claim nothing upon the ground of Elliot's lien for purchase money.



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Jackman's judgment did not attach as a lien upon Decker's equitable interest in the land. This court have so decided in the case of *Roads v. J. C. Symmes and Stanberry* at this term.

An execution issued by a justice of the peace can not be levied upon lands; it follows as a necessary consequence that a judgment upon a justice's docket can not attach a lien upon real estate. The proceedings upon *sci. fa.* is not to have a new judgment, but an execution of a particular character. Upon this *sci. fa.* no judgment is rendered; execution only is awarded as prayed for in the writ. This award of execution can not attach a lien upon land before levy, which is only effected by a judgment for money. It gives a new capacity to the justice's judgment, but no new effect. In such case, lands, like chattels, are bound from the levy and not before.

On the first point Judge BURNET dissented.

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**321] \*NATHAN STARR v. EPHRAIM STARR, TRUMAN STARR,  
AND GILES GRISWOLD.**

*Fraudulent Conveyance.*

In a suit by a purchaser under execution, an original judgment can not be controverted.

A conveyance made voluntarily by a debtor to his creditor is without consideration, if the parties afterward treat the debt as still subsisting between them.

There may be a tacit as well as an express trust.

THIS was a suit in chancery reserved for decision here, in Cuyahoga county. It was in the nature of a *quia timet* bill, and its object was to disembarass certain lands of a title set up to them by the defendants, Truman Starr and Giles Griswold.

The complainant derived title under certain proceedings in attachment prosecuted by him against Ephraim and William Starr. The attachment was sued out of the common pleas of Cuyahoga county, on the 13th day of May, 1819; the lands in question were attached, and such proceedings had that they were sold and pur-

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chased by the complainant, and a regular deed obtained from the sheriff.

The bill charges that Ephraim Starr, the original debtor and owner of the lands, had previously made a pretended sale to the other two defendants, fraudulently and without consideration, and upon a secret trust that Ephraim Starr should have the benefit, and calls upon the defendants to answer.

Ephraim Starr, in his answer, states that in the year 1816, Nathan Starr, the complainant, and William Starr were partners in trade in New York, and agreed upon a dissolution. That William Starr assumed the payment of all the debts of the firm, and that Ephraim became his security in a bond to Nathan, to indemnify Nathan against the debts of the firm. It was upon this bond that the proceedings in attachment were had, and Ephraim denies any knowledge of the debts of the firm paid by Nathan after making the bond. He further states that in the year 1817, he resided in New York, and was indebted to Truman Starr about \$11,000 for money borrowed, and to Giles Griswold about \$3,000. That to secure the payment of these sums, he, on the 1st day of May, 1817, conveyed to Truman Starr the lands in question, with others, in the whole about 5,000 acres, with intent that Truman should convey an equal proportion to Giles Griswold, which deed he delivered to Truman Starr, and received from him a power of attorney to sell the same lands.

\*He further states that some time afterward he found it necessary to apply for the benefit of the insolvent laws in the State of New York. And at this time, the deed, not being recorded, was returned to him by Truman Starr, and Truman Starr, as well as Griswold, signed his petition as a creditor, praying that he might have the benefit of the insolvent laws. He further states that after his discharge under the insolvent law, feeling himself morally bound to pay the debts due Truman Starr and Giles Griswold, he made to them a new deed, antedated so as to bear date the 1st May, 1817, the purpose of which was to protect sales made under Truman, anterior to the date of the second deed. This deed, he states, he made without the knowledge of Truman Starr, and kept it in his possession until September, 1818, when it was delivered, and his notes held by Truman Starr given up and canceled. The original power of attorney from Truman to Ephraim Starr was retained under which sales had been made by Ephraim as attor-

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ney for Truman, and moneys received and accounted for. He relies upon his discharge under the insolvent laws of New York, as discharging him from liability on his covenant to Nathan Starr, upon which the proceedings were had. He denies all fraud and all secret trusts in making the conveyance.

Truman Starr's answer is substantially the same. Griswold, in his answer, states that he knows nothing of the facts charged, further than that Ephraim Starr was indebted to him, and that he had received a conveyance of land from Truman Starr, in pursuance of an understanding between Ephraim and Truman at the time the conveyance was taken by Truman of the land in dispute.

At the hearing, the complainant adduced an authenticated transcript of the proceedings and discharge of Ephraim Starr, under the insolvent act of New York, from which it appeared that Truman Starr and Giles Griswold were petitioning creditors.

The defendants produced the deed from Ephraim Starr to Truman Starr, which bore date May 1, 1817, and had on it a certificate of its acknowledgment by Ephraim Starr, before a master in chancery, September 10, 1817. It also had on it the certificate 323] of the acknowledgment by Mrs. \*Starr, dated September 17, 1818. Her name, inserted in the body of the deed, and her signature, are in different ink from the other parts of the deed, and the ink appears to correspond with that in the certificate of her acknowledgment; it was recorded before the attachment issued.

Copies of the power of attorney from Truman to Ephraim Starr, and an agreement of counsel as to sales made by Ephraim in the name of Truman, under that power, were also produced. The deed from Truman Starr to Giles Griswold was executed after the attachment issued.

Mr. WHITTLESEY, for the defendants, maintained:

1. That the answers being responsive to the bill, and denying the trust charged, and the fraud alleged, in the making of the deed, these allegations must be put out of the case, unless the answer is disproved by testimony, which is not done here. 10 Johns. 524.

The fact that Truman Starr and Giles Griswold were petitioning creditors for Ephraim Starr, subsequent to the execution of the

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deed, and thereby avowed the existence of the debts which the deed was given to liquidate, is insufficient to show fraud in making the deed. If the deed was made for a good consideration, it is not rendered void by the commission of a criminal offense afterward in relation to the same transaction; nor does the commission of such offense relate back so as to raise a trust, or constitute a fraud.

2. It is not fraudulent for a debtor to prefer one creditor to another. 5 Johns. 412; 3 Johns. Ch. 446; 4 Johns. Ch. 682; 2 P. Wms. 428; 15 Johns. 571. The insolvency of the debtor does not vary the case.

3. The redelivery of the deed did not reconvey the title. 3 Cruise, 370; 6 East, 86; 8 Johns. 395; 1 Johns. Ch. 422.

The complainant has admitted the original execution of the deed; and the original consideration being stated in the answers in reply to interrogatories, it is evident that the fee passed. It vested in Truman Starr, and could only be divested by a reconveyance. If this position is not tenable, then it is insisted:

4. That the debt, though extinguished by the discharge under the act of insolvency, was revived by the new deed, \*and [324 constituted a good consideration. A promise to pay a debt thus situate, is founded upon consideration and may be enforced. 7 Johns. 36; Cowper, 544; 2 Term, 763. The second deed was made and recorded before the attachment sued out, and there is no proof of any creditor then existing to be defrauded. The judgment on the attachment is *ex parte*. If it conclude Ephraim Starr, it can not conclude the other defendants.

5. The contract upon which Nathan Starr recovered, was discharged by the proceeding under the insolvent law of New York. 9 Johns. 325. The defendant was not liable upon it. It is not a subsisting debt to taint a conveyance with fraud as against a creditor.

LYMAN and BRUSH and FITZGERALD submitted arguments on the same side:

They further contended, that in respect to Giles Griswold, he could not be affected. He knew nothing of the principal matters, was party to none of them; but was a creditor, and received his deed in payment of a fair debt, and ought to be protected.

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KELLY and GRIMKE, for complainants :

Whether there were two, or only one deed, or whether the first or second deed be considered as the one upon which the defendants rely, can make no difference. Both were voluntary, and made by a man in failing circumstances. All such deeds are held fraudulent, and were so held at the common law, without the aid of statutory provisions. Cow. 432. The doctrine maintained by Lord Mansfield, in the case cited, is fortified by a multitude of decisions, both in England and America. It is distinctly recognized by Chancellor Kent, in *Boyd v. Dunlap*, 1 Johns. Ch., and in *Hildreth v. Sands*, and *Roberts v. Anderson*, 2 Johns. Ch., and by the Supreme Court of the United States, 8 Wheat. 243.

Deeds not made for a valuable consideration, as to creditors are voluntary. But this deed was in every sense of the term voluntary. It was never required by the grantee, was made without his knowledge upon the mere voluntary motion of the grantor, and the debt, which was the consideration, still subsisted. It remained in 325] the power of the \*grantor, and the estate was put under his control, and evidently managed by him, for himself.

The secrecy with which the deed was preserved, is also a badge of fraud. The secret interest, pretended to be created for Giles Griswold, is another badge of fraud. In respect to him, Truman Starr was a trustee, not for Giles Griswold, but for Ephraim Starr. Indeed, the whole case shows that Truman was, in fact, a trustee for Ephraim of the whole title. Where the deed remains under the control of the grantor, or where there is a secret trust for his benefit, the deed is fraudulent and void. 1 Ch. Cases, 244; Neal's Equity, 126.

It is true the answer in terms denies both the fraud and the trust. But this denial can avail the defendants nothing. The facts, they state themselves, admit of no interpretation other than that the whole was a fraudulent scheme.

Both Truman Starr and Giles Griswold were petitioning creditors for Ephraim Starr after the execution of the first deed. As their debts were the avowed consideration, they must have been extinguished, had the transaction been in good faith. They swore they were creditors when the petition was filed. By this they are concluded. And as their debts were not extinguished, the first deed was without consideration clearly and unquestionably, upon the facts as stated by the defendants themselves.

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The second deed is without consideration. The debts due from Ephraim Starr to Truman Starr and Giles Griswold were discharged by the discharge of Ephraim Starr under the insolvent law of New York. They were petitioning creditors, and assented to the discharge. They must be bound by an act to which they assented, for which they petitioned.

This debt, however it might be revived by a promise to pay it between the parties, can not be revived by the mere execution of a deed, as in this case, against other creditors. The case, *ex parte Burton*, 1 Atk. 255, is an authority to this point.

The covenant of Ephraim and William to Nathan Starr was not affected by the discharge of Ephraim under the insolvent law of New York. At the time of that discharge, Nathan had no cause of action on that covenant. It had not been broken. Nathan Starr was not a petitioning creditor for Ephraim Starr, and could not be, for he was not then his creditor at all. The debts which Nathan Starr was compelled to pay, were not scheduled as debts due from Ephraim Starr in his schedule. He made oath to that schedule as containing all the debts he then owed. He can not be permitted to say that this debt was then due, and his oath false.

The case of Giles Griswold can not be distinguished from that of Truman Starr. It stands upon the same deed with that of Truman Starr, and, if that deed be fraudulent and void as to one, it must be as to both. 3 Johns. 371.

By the Court:

The complainant claims title under a sale upon execution, founded on a judgment rendered at law, in action of covenant commenced by attachment. This judgment can not be here controverted. It is conclusive that Ephraim Starr owed him the debt, for which it is rendered at the time stated in the proceedings, and places him in the attitude of a creditor, entitled to contest the fairness of the title which the defendant set up to the land in dispute.

This title is a deed of conveyance from Ephraim Starr to Truman Starr, dated May 1, 1817. The deed is produced, and upon inspection, it appears to have been acknowledged by Ephraim Starr upon the 10th of September, 1817, and by his wife upon the 17th of September, 1818—the wife's name and signature being

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inserted in ink different from that of the writing in the body of the deed, and corresponding with that of her acknowledgment. It is evident that although two deeds are spoken of in the answers, there never was but one executed. The same deed made and acknowledged by Ephraim Starr in 1817, was executed by Mrs. Starr in 1818. There is no reason to presume that the master in chancery, taking Ephraim Starr's acknowledgment, antedated his certificate. And this must have been done, if the deed produced was executed after Ephraim Starr's discharge, as stated in the answer.

The defendants all insist that the first deed was executed in May, 327] 1817, to secure the debts due from Ephraim \*Starr to Truman Starr and Giles Griswold. The date of the deed corresponds with this statement, and the court being satisfied that there was but one deed, and that this is it, the right of the defendants, Truman Starr and Giles Griswold, depend upon the validity of this deed.

The court agree with the defendants' counsel, that the redelivery of the deed did not reconvey the title. That redelivery is of no other importance than as one of many circumstances elucidating the character of the transaction. The deed is absolute and indefeasible; the consideration for which it was given, must have arisen at the time of its execution. If given in payment of an existing debt, there must have been an agreement that the debt should be extinguished. If the debt subsisted, and was really due, after the deed was made, there was no consideration.

It is distinctly admitted by all the parties, that the debt was not extinguished, but remained due between them. Truman Starr presented himself a petitioning creditor for account of this very debt. Giles Griswold did the same with respect to his. Both made affidavit that his debt was due to him, which could not be the case, if it had been paid by the conveyance of the land in question. Ephraim Starr, in his answer, distinctly states that it was in September, 1818, that the notes, evidences of the debt, were given up and canceled upon the delivery of the pretended second deed. Truman Starr states the same thing. The avowed object of making the alleged second deed was to discharge this debt, which Ephraim felt a moral obligation to pay.

The deed, if operative at all, was operative from May, 1817. At that time, and until September, 1818, the parties to it show that it was without consideration. And being so, the grantee held the title in trust for the grantor. It was not recorded, and there

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is no evidence, except the allegation in the answers, that it ever was in the power of the grantee before September, 1818; and how long it was in the power, if ever, is not alleged.

The suggestion in the answer that Truman gave up the deed to become a petitioning creditor, is in every view of it most lame and impotent. If the transaction had been in good faith, the execution of the deed extinguished the debt. The redelivery, or giving it up, could not revive the debt, \*unless there was a con- [328 tract that it should do so. Such a contract would have vested an interest in Ephraim which he was bound to put in his schedule for the benefit of his creditors. Nothing of this kind was done. If the debt was paid by making the deed, Truman Starr was guilty of both fraud and perjury in presenting himself a petitioning creditor. If the debt was revived by agreement when the deed was given up, Ephraim Starr was guilty of perjury, and fraud too, in not assigning it for his creditors' benefit. But if the conveyance was voluntary, upon no secret trust distinctly expressed, the conduct of the parties is more consistent than it could be upon any other supposition.

The circumstance that Ephraim Starr, the grantor, continued to exercise control over the property, and sell and dispose of it, receiving the purchase money, and making conveyances, is an additional badge of trust and fraud. It does not essentially change the character of this part of the transaction, that Ephraim acted under a power of attorney from Truman. That power was created at the time of the conveyance, and continued unrevoked after the return of the deed to Ephraim. Like the deed itself, it was kept a secret until it became necessary to use it to enable Ephraim to enjoy the benefit of the land.

It is another strong and unfavorable circumstance that the deed, though unrecorded, was permitted to remain for so great a length of time, in the hands of the grantor; and was a second time brought out, not at the request of the grantee, but upon the motion of the grantor, and the consideration got up, that of a debt discharged by the proceedings under the insolvent law, upon the petition of the grantee.

All the principal facts of the case unite in convincing a majority of the court, that the deed was originally made voluntarily and without consideration, and that the object was to cover the land from creditors, and save it, that it might be enjoyed by the



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grantor. That this trust was not formally declared or expressed between the parties, is no reason why it can not exist. The law is not to be evaded by contrivances of this nature. A trust, tacitly created, is more difficult to reach than one that is expressed; but when it is ascertained the same consequence is attached to it.

§29] \*Giles Griswold is in no better situation than Truman Starr. His title rests upon the same deed, which was never operative. And although he was no party to the original transactions, yet he acquired no interest in the lands until the conveyance was made to him. He could not enforce the parol trust in Truman Starr, if there were no doubt of its existence. And his deed is made since the land was attached, and since a right was commenced in the complainant. Both deeds must be decreed fraudulent and void.

Judge BURNET's dissenting opinion:

I dissent from the opinion of the court in this case, principally, because the defendants, Truman Starr and Giles Griswold, have expressly denied the fraud imputed to them, and their answers have not been contradicted by a single witness.

They were creditors to Ephraim Starr, for money lent, to a greater amount than the estimated value of the land, and whatever might have been the fraudulent views of Ephraim Starr, or the imposition practiced by him, on his creditors, these defendants are not infected by it. Fraud must be proved; it can not be presumed. The facts from which unfavorable inferences might be drawn, against these defendants, appear to be satisfactorily explained. They may all be true, and they perfectly innocent. On such grounds, I can not agree that the complainant, who is an after creditor, has a right to wrest from them their *tabula in naufragio*, and effect, for his own exclusive benefit, the same object, which he alleges is a fraud in them. Their equity, to say the least of it, is as strong as that of the complainant. It is prior in point of time, and they have the law on their side. Equity being equal, the law prevails. *Prior est in tempore, potior est in jure.*

The deed first executed, and delivered by Ephraim to Truman, was for a valuable consideration. It was made before his application for the benefit of the insolvent laws of New York, and when he was at liberty to prefer one creditor to another. The execution and delivery of this deed vested the legal title in the

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grantee, and the conveyance was complete. As the land was not received in full discharge of the debt due to Truman, and to Griswold, it \*was perfectly consistent with the nature of the [330 transaction, that the notes of Ephraim should be retained until the proceeds of the land should be ascertained. When that was done, the amount was to be credited, and the residue, if any, would have continued a subsisting debt.

The redelivery of the deed to Ephraim did not divest the grantee of his title, or render the conveyance void, and the fraud that might have been practiced afterward, on the bankrupt laws of New York, could not relate back, so as to avoid a conveyance previously made, in good faith, and for a valuable consideration.

The second deed may be considered as a nullity, because there was no interest in the grantor that could be conveyed by it, and I can not discover how the validity of the first deed can be affected by the subsequent conduct of the parties, in relation to third persons, who had no interest or concern in the transaction.

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COURCIER AND RAVISES v. THOMAS GRAHAM.*Pleading—Title—Evidence.*

Covenants independent, dependent and mutual.

The plea of *non est factum* puts nothing in issue but the execution of the deed.

Upon default, plaintiff in covenant is not bound to prove the averments of his declaration.

When deed may be presumed.

Complete connected paper title is necessary where a party covenants to make an indisputable title.

A deed attested by one witness does not convey title.

The value of merchandise agreed upon by the parties can not be controverted where fraud is not alleged.

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THIS was an action of covenant, founded upon an article of agreement executed on the 26th day of March, 1818, for the sale of a tract of land particularly described and upon particular terms.

The plaintiff stipulated to deliver to the defendant merchandise

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to the amount of \$11,418.32, upon account of the purchase of the land; and from time to time, when thereto required, within one year from the date, to deliver to the defendant or his order any further quantity of merchandise, as he or his agent might select, to the amount of — dollars, further on account of the land.

The price of the land was to be fixed by three persons living in Cincinnati, to be chosen by the parties within six months; Graham covenanted that if he approved the price fixed he would, at the end of one year from the date, by a good and sufficient deed of conveyance and assurance in the law, well, and sufficiently, grant, convey, and assure the land to the plaintiffs, in fee simple, §31] clear of all incumbrances, and *at the same time deliver the possession of the premises to them*, they securing to be delivered on demand to the defendant, or his order, such goods suitable to the Cincinnati market, at a fair price, as he may choose, to the amount of any difference beyond the amount of goods and merchandise then actually received.

The declaration contains a single count. After reciting the substance of the covenant, and averring the delivery of the \$11,418.32 amount of goods, it alleges that the plaintiffs have, "at all times since the making the said article, been ready and willing, when legally required, and upon reasonable request made by said Graham or his order, to deliver to him or his order any other and further quantity of goods, wares, and merchandise, which he, the said Graham, or his agent, might select, when the same should be selected, on account of the aforesaid tract of land, agreeably to the provision and stipulations contained in said article. And the plaintiffs further say, that since the execution of said articles they have at all times been ready and willing, in pursuance to the terms thereof, to receive a good and sufficient deed, etc., and to pay or deliver to said Graham, or to secure to be delivered to him or his order on demand, such goods, suitable to the Cincinnati market, at a fair marketable price, as he or they may choose, to the amount of the difference, etc. And they further say, that since the execution of these articles, and since the expiration of the year therein mentioned, they have at all times, at the period in said articles contemplated, been ready to receive possession of the premises in the said article described. And in fact they say their covenants have been kept and performed. And they further in fact say, that although the period of one year,

mentioned in said articles, at the end of which the said Graham, by his covenant, should have conveyed the said land, has long since elapsed and gone by; and although the said tract of land has been long since valued, and the price fixed to the same, and the said valuation approved by said Graham, yet said Graham, well knowing the premises, and well knowing that he had and did receive the goods and merchandise in said articles specified, amounting in value to \$11,418.32, and that the said plaintiffs had well and faithfully fulfilled and performed \*all and [332 singular the covenants and agreements on their part in this behalf to be kept and performed, nevertheless, said Graham has not executed and made to said plaintiffs a good and sufficient deed, nor hath he delivered possession, nor hath he secured to be paid the value of the said goods and merchandise; wherefore his covenants he hath not kept, but hath broken the same," etc.

The plea is *non est factum*, without an affidavit, but accompanied with a notice stating an offer to perform, a tender of the deed, bad quality of the goods, etc.

The plaintiffs gave in evidence the covenant declared upon, and proof of the delivery of the merchandise stated in it. They also gave in evidence a letter from Graham to the plaintiffs, dated at Philadelphia, October 20, 1818, stating that he had approved the price fixed by the valuers, and intended to comply with the contract; and submitting for consideration a connection of the paper title, and a conveyance from himself to the plaintiffs; and remarking it was doubtful whether he could tender a performance at any other time than the end of the year, and adding, "I am ready either now or then to perform what is necessary;" and remarking also, that the deed from Symmes to Dayton, under whom the title was derived, was not among the papers, but should be supplied.

The plaintiffs also gave in evidence a letter from them to the defendant, dated October 22, 1818, objecting to the sufficiency of the title:

1. That there was no deed from Symmes to Dayton.
2. That Mrs. Symmes had not relinquished her dower.
3. That the deed from Vanhorne to Williams was not recorded in time.
4. That there was no certificate that there were no unsatisfied judgments against intermediate owners.

Upon this proof the plaintiffs rested the case, stating to the jury that they claimed to recover the \$11,418.32, with interest.

The defendant moved the court to direct a nonsuit, upon the ground that the evidence given by the plaintiffs did not make out their cause of action as alleged in the declaration, and the court reserved the decision of this motion until the cause was further 333] heard, and directed the defendant to \*proceed in the case. The defendant then gave in evidence that he had tendered a deed to the plaintiffs on the 30th of March, 1819, in compliance with his contract, and also, that he had offered to the plaintiffs for their acceptance a deed, with an abstract of the title, in October, 1818, and also, in February, 1819, before the end of the year in the covenant stated, to which the plaintiffs objected, because there was no deed from Symmes, who received the patent from the government, to Jonathan Dayton, under whom Graham deduced title, and because of several supposed existing claims for dower. The defendant also gave evidence of the possession of Joel Williams, from whom he purchased, and of a connected and uninterrupted possession, from and under a purchase made from Dayton, in the year 1791. And also the paper title from Dayton to the respective persons in succession, who had held possession down to Joel Williams, from whom the defendant derived possession, except a deed from Riddle to Vanhorne, which deed, dated in the year 1808, attested by one witness, acknowledged before a justice by the grantor, and recorded, the defendant also offered in evidence; but upon the suggestion of the plaintiff's counsel, it was rejected by the court. The defendant also gave in evidence a deed from J. C. Symmes to Moses Miller, for a tract of land adjoining the section No. 19, in which the land in question is situate, bearing date November, 1798, reciting that Jonathan Dayton was the purchaser and locator of section 19. The defendant also gave in evidence the deposition of Jonathan Dayton, stating that a deed had once existed from Symmes to himself for said section.

Upon this evidence the defendant asked the court to instruct the jury that, by a just construction of the covenant, the place for the carrying it into execution was Cincinnati; that the deed must be made, the possession delivered, and the delivery of the goods on demand secured, at the same time; and the plaintiffs not having alleged in their declaration, or shown in evidence, that they were ready at Cincinnati at any time to perform the contract on their

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part, and accept a performance from the defendant, they could not recover at all in this action, or if they could recover, could only recover nominal damages. But the court instructed the jury that the plaintiffs were entitled to recover the full damages \*they [334 might have sustained without adducing any proof of the matters claimed as necessary to be made out in proof by the plaintiffs.

The defendant also asked the court to instruct the jury that upon the evidence adduced, they ought to presume a deed from John Cleves Symmes to Dayton. And that the deed from Riddle not being in evidence before the court, and not having been objected to by the plaintiffs, at any time, until the trial in the common pleas, and the possession under it having continued so that the possession of Graham or those claiming under him could not be disturbed, a good and sufficient title was made out to satisfy the terms of the covenant. But the court instructed the jury that no continuance of possession for any time less than where the statute of limitations would operate to bar a recovery in ejectment was sufficient to warrant the presumption of a deed, and that if the title was found to have been in Dayton, no other title would satisfy the terms of the contract, except a complete connected paper title from Dayton to Graham, the defendant.

The defendant also gave in evidence to the jury, that the goods delivered as stated in the covenant were of very inferior quality, and were not worth in money the sum stated as their price, and asked of the jury, if they found a verdict for the plaintiffs, to find such sum only as the true cash value of the goods. But the court instructed the jury that it was not competent for the defendant to contest the justness of the price fixed upon the goods in the covenant, and that such price must be taken by the jury as their true value.

The jury found a verdict for the plaintiffs for the amount of the goods, with interest.

The defendant moved the court for a new trial upon the ground of misdirection in all the matters here stated. The consideration and decision of this motion, as well as of the point reserved in regard to a nonsuit, was adjourned to Columbus.

ESTE and HAMMOND, for the defendant:

Upon the evidence adduced by the plaintiffs, they are not entitled to recover, and a nonsuit ought to be directed.

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335] \*The object of the action is either to disaffirm the contract and recover the deposit or purchase money paid; or to affirm it, and recover the value of the bargain.

If the first, the evidence is insufficient; it shows only an inability to comply in October, when the party had until March following to enable himself to complete the contract. The right of one party to abandon the contract, upon the ground that the other is unable to perform it, can only be sustained by proving an inability to comply at the time of performance. The proof here is, only that the title to be conveyed was not complete five months before the conveyance was to be made.

The party who intends to disaffirm his contract, and claim to receive back the money paid on it, ought to give notice of such intention, and when he sues, shape his action and declaration accordingly. Sugden on Vendors, 159; 2 Esp. 639; 3 Bos. & Pul. 162, 246. Neither the declaration nor testimony, makes a case of this character.

The declaration in this case affirms the whole contract; it assigns breaches upon every covenant, and avers a performance or readiness to perform all the covenants on the part of the plaintiff. By the terms of the article, the plaintiffs were to perform everything they undertook to do, before the defendant was to convey the land. In relation to the conveyance, everything was precedent. The averment, therefore, that the plaintiffs had performed, or were ready to perform, was indispensable. Without it, their declaration would have been bad. 1 Salk. 112; 7 Term, 121; 8 Term, 366; 1 East, 201; 5 East, 107, 112. From the same authorities it appears, that it was as necessary to prove these averments, at the trial, as it was to insert them in the declaration. No such proof was adduced; for this reason the plaintiffs ought to have been nonsuit.

There ought to be a new trial:

1. Because the plaintiffs did not entitle themselves to recover anything beyond nominal damages.
2. Because the defendant had tendered a good title.
3. Because the court misdirected the jury as to the value of the merchandise received under the contract.

1. There must be some *place* where the contract was to be performed; that place was Cincinnati. *There only* the \*possession could be delivered. There the title could be investigated. There the law as to the validity and execution of the deed could be

best understood. The plaintiffs could not recover without proof that they were at Cincinnati on the day ready to give security for the delivery of the balance of the goods, and receive a title. The authorities above cited are full to this point. And of these necessary facts no proof was offered.

It is said that this proof, under the pleadings, is not necessary; that *non est factum* puts nothing in issue but the execution of the deed. But *non est factum* is the general issue, and puts the plaintiff upon the proof of his whole case. Were it, however, as is contended, *non est factum* pleaded, can not place the defendant in a worse condition than if no plea were put in and judgment signed against him on default, and in that case, if the plaintiff seeks to recover more than nominal damages, where the action sounds in damages which are uncertain, he must prove his whole case. 2 Black. 748; 3 Term, 302, per Buller; Strange, 1149; 1 Sel. Prac. 335; Doug. 302.

2. The title of the defendant, and which he offered to the plaintiffs, was a good and indisputable title. He showed a conveyance to himself from the person last seized and a paper title, accompanied with a possession from the year 1791 downward. One deed in the chain of title was defectively executed. But though inoperative as a conveyance, it was good and available to protect the possession given under it against the party and his heirs. Neither could recover in ejectment against the person claiming and in possession under the purchase. The title, which can not be disturbed, is indisputable.

No deed was produced from Symmes to Dayton; but there was full proof of its having existed. If this had not been done, it ought to have been presumed after a lapse of twenty-seven years, and a possession evidently founded upon the fact that there was such a deed. Phil. Ev. 119; 7 Wheat. 110; 6 East, 215; 10 Johns. 377.

It is not enough for the plaintiffs to cast doubt upon the title. In a case like this they must prove it to be positively bad. Sug. Ved. 157; 4 Esp. 221; 3 Bos. & Pul. 426.

3. The defendant was not concluded by the stipulated \*price [337 of the goods delivered on the contract; but might prove that they were of less value.

It was not a contract to purchase for cash, but for an exchange of commodities. In such cases, where estimations are made on



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both sides, it is usual to affix a price essentially different from which either party would agree to pay in money. When a recovery in money is to be substituted for the article originally contemplated by the parties, the true value in money of the commodity received, ought to be the rule of damages. The case of *Basten v. Butler*, 7 East, 479, and the cases cited in the notes, sustain us in the principle we contend for.

Rowan, for the plaintiffs :

The suit in this case was an action of covenant; the breach alleged was a failure to convey a tract of land.

The plea was *non est factum*. Under that plea, and by virtue of the statute in that case provided, the defendant specified in a written notice the grounds upon which he rested his defense.

Those specifications are to be considered in the nature of special pleas to the action, and like all other pleas, admit whatever is well pleaded in the declaration, which they do not traverse or deny.

The pleas, therefore, not having denied the readiness on the part of plaintiffs to comply with their part of the covenant, admitted it, and thereby absolved plaintiffs from the necessity of proving it; for what is admitted by the pleadings need not be proved.

The motion, therefore, made by the defendant to instruct the jury, as in case of a nonsuit, because the plaintiffs did not prove the readiness, which they had alleged in the declaration, to comply with the covenants on their part, was properly overruled by the court. Upon any other principle, the pleadings, instead of conveying notice to his adversary, of the grounds relied upon by each, would operate as a decoy, and entrap instead of promote the justice of the case.

Whatever is said about the competency of the declaration is foreign and irrelevant. It can only be brought before the court, by demurrer, or error in arrest of judgment.

338] \*What is said about the place of performance can cut no figure. If the defendant had pleaded his readiness to perform, and his incapacity to do so without the concurrent agency of plaintiffs at Cincinnati, then the court would have been obliged to have determined the place at which performance was, by the covenant of the parties, to have been done. But the matter was not drawn in question by the pleadings. The same principle applies to all

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that is said in relation to the absence of proof on part of plaintiffs, as to their readiness to secure the payment of balance.

For it is a settled rule of law, that the obligor is bound to perform his covenant according to its import, unless the *concurrent agency* of the obligee is *necessary* to the performance on his part. But the defendant has not, in this case, intimated by his pleas, that he was restrained from performance, by the absence of such *concurrent agency*.

What is said about the necessity the plaintiffs were under of affirming or disaffirming the purchase, or contract, in their declaration; or of their going in the declaration for the *earnest money*, or for the worth or value of the contract, is considered irrelevant. First, because they did not, and could not, legally arise in the cause, there being no demurrer to the declaration; and next, because the action was brought on a specialty, and the contract being by specialty, no other *mode of suit* or of declaration, is sanctioned by rules and usages of law; an action for the earnest or deposit money must have been an action on the case for money had and received, etc. But that action will only lie where the contract is by parol. The contract in this case was by *deed or specialty*. The distinction of contracts into *parol* and by *specialty* is well known; and that a *seal* constitutes the boundary line is not less known, and that the action for money had and received, will not lie where the contract is by specialty, can not be doubted.

The grounds for a new trial are considered utterly untenable. A motion for a new trial must, in every case, address itself to the *sound discretion of the court*, and it is to be granted, or refused, as upon a just survey of the case, and all its circumstances, the court shall believe the substantial justice of the case *requires*.

\*In this case it is alleged that the substantial justice of the [339 case requires it: 1. Because proof as to the value of the goods received by defendant was not permitted by the court. In answer to that, it is alleged that what is *agreed* by the *parties*, need not be proved, and the parties had themselves agreed upon the value of the *goods* and, therefore the court rightly excluded proof as to their value. And next, because the defendant, by complying with his contract, might have silenced all dispute upon this subject.

But it is again said that the defendant was ready, willing, and able to comply with his contract. This leads to a consideration

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of so much of the contract as relates to his *capacity*. By the covenant he was to convey to the plaintiffs by a deed in *fee simple*, clear of *all incumbrances*; the *title to be indisputable*, etc. Did the defendant exhibit an *indisputable title*? Did he even exhibit a title *free* from, or *clear of*, all *incumbrances*? There were *two links broken*, or rather *absent* from his chain of title. There was no conveyance from Symmes, the patentee, to Dayton. There was no legal deed from Riddle to Vanhorne. There were sundry dower claims *unrelinquished*.

The first question is, what is meant by the words *indisputable title*, in this covenant? Did the parties mean a clear, well connected, legal title, according to the laws regulating conveyances, and the *tenure of realty thereby*, or did they mean an *inferential* title, one which might be deduced, in a *course of disputation*, from possession, and facts in the country, which existed in *presumption* of law upon a given state of fact, or a title in *fact*, which silenced all *presumption*, and *excluded all facts* which it did not *import*? Surely the latter. This is the meaning of those terms, in common parlance, as well as in law. It is a rule, that in expounding deeds, the terms are to be taken *most strongly* against the *obligor*. This was evidently the understanding of defendant himself, because he acknowledged when he presented the abstract of title, the absence of the deed from Symmes to Dayton, and his obligation to procure it.

But the idea of substituting *possession* for *title* never occurred to him, when making out the abstract of his title.

That dower is an incumbrance has been settled over and over 340] again. The chancellor has repeatedly enjoined the \*payment of the balance of the purchase money until dower should be relinquished. An indisputable title, free from all incumbrances, means not only that it shall be free from *actual existing*, but from *probable*, and even *potential incumbrance*.

The chancellor will never decree the payment of the purchase money, when *doubt hovers over the title*, still less when there are two links wanting in the chain of title, and when there are several dower claims which may be asserted.

The verdict, then, is according to the *justice* of the case, and ought not to be disturbed. It is according to the *law* of the case, and ought not to be disturbed.

The pleas were, first, *non est factum*, which questioned only the

execution of the deed; second, tender of performance; and third, want of value, or rather reduction of value on the goods.

For each of these notices must be considered in the nature of a special plea. Taking, then, the three pleas together, or separately, all the allegations of the declaration, which are not controverted by them, stand admitted, and being admitted, need not be proved by plaintiffs, and can not be questioned by defendant. By his plea of tender, he takes upon himself the proof that he has offered to convey an indisputable title, clear and free from all incumbrances, and admits that he was reduced by the performance of plaintiffs, and their relative posture to him in other respects, to the necessity of making a tender of a conveyance of that character. In every view, therefore, of the case, judgment should be rendered upon verdict for plaintiffs.

Opinion of the court, by Judge HITCHCOCK:

In the case of *Kingston v. Preston*, Doug. 690, 691, Lord Mansfield observes, "There are three kinds of covenants: 1. Such as are called *mutual* and *independent*, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are *conditions dependent* on each other, in which the performance of one depends on the prior performance of the other, and, therefore, till this [341] prior condition be performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are *mutual conditions* to be performed at the same time, and in these, if one party was ready, and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act."

Much difficulty arises at times in the construction of covenants, and in ascertaining whether they are dependent or independent; but the same rules must be adopted as in the construction of other instruments of writing. The intention of the parties is to govern, and that intention must be collected from the whole instrument taken together. The order of time in which the several acts are to be performed, however much they may be transposed in the

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deed, will show the intent of the transaction. If, upon the whole, it shall appear to have been the intention of the parties to trust each to the personal security of the other, the covenants must be considered as independent. So when the covenants in a deed are established, in one particular instance, to be independent, it seems to be settled that they must be so considered throughout, although in the deed there may be mutual acts to be performed at the same time, or although the plaintiff had covenanted to do certain acts on his part, in the intermediate time, between the performance of the different acts to be done by the defendant. 2 Johns. 273, 387; 5 Johns. 78; 2 H. Bl. 389. So where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, it has been determined that they are to be regarded as independent. 7 Johns. 244, and cases there cited.

In declaring in covenant, the declaration must be varied according to the nature of the instrument declared on. If the liability of the defendant depends upon the performance of a prior covenant or condition on the part of the plaintiff, performance or a tender of performance must be averred, or the declaration will be bad on demurrer. If the covenant contains *mutual conditions* to [342] be performed at the *same time*, the \*plaintiff must aver that he was ready and offered to perform on his part, but it is not necessary that he should aver performance, or an actual tender of performance. 1 East, 203; 3 Bos. & Pul. 457; 5 Johns. 179.

There is, perhaps, more difficulty in determining to which class of covenants the contract before the court belongs than seems to be apprehended by counsel. The agreement was made on the 27th of March, 1818, at which time, merchandise, estimated at the value of *eleven thousand four hundred and eighteen dollars and thirty-two cents*, was paid by the plaintiffs, Courcier and Ravises, to the defendant, Graham, and paid as expressed in the contract, on account of the purchase of the land. They covenanted to deliver the aforesaid amount of merchandise forthwith, and the evidence proves that it was forthwith delivered. In addition to this, they covenanted that they would, "from time to time, when thereunto required, within one year from the date hereof, deliver to him, the said Thomas Graham, or to his agent, or order, any further quantity of merchandise, as he, the said Thomas Graham, or his agent, or order, may select, at a fair market price, to the amount of — dollars, further on account of the aforesaid tract of land." The

defendant, Graham, agreed on his part, that, if he approved of the price at which the land should be valued, he would, at the end of one year from the date of the agreement, convey, by good and sufficient deed of conveyance, etc., the same land to the plaintiffs, they securing to be delivered, on demand, to the said Graham, or his order, etc., goods suitable to the Cincinnati market, etc. But if Graham did not approve of the price at which the land should be valued, then, at the end of one year from the date of the agreement, he was to secure the payment for the goods which had then been received, and which should thereafter be received, etc., in four annual payments, with interest after one year. By the terms of this contract, the land was to be conveyed, and the purchase money secured at the same time, and had these been the only acts covenanted to be performed, the covenant would have been clearly within the description of those containing *mutual conditions* to be performed at *the same time*, and neither party could have sustained an action against the other without showing a readiness and offer to \*perform. The plaintiffs covenanted to deliver goods of [343] the value of eleven thousand dollars and more forthwith. Had they refused to deliver these goods, might not the defendant have had his action against them for the breach of this covenant, and that, too, without waiting until the end of the year? They further covenanted to deliver other merchandise in addition, within the year; and had this merchandise been selected and demanded, what could have prevented the defendant from maintaining an action against the plaintiffs for a breach of this covenant, provided they had refused to deliver the merchandise thus selected and demanded. Graham, on his part, was bound to do nothing until the end of the year, except to agree in the appointment of three persons to value the land. He was neither bound to convey, nor to secure payment for the goods. Now if to this case we apply the principles which were settled in the case cited from 2 and 5 Johnson, it would appear to me to be at least doubtful whether these must not be considered as independent covenants.

Again—let us compare the covenants in this case with those in the case of *Bennett v. The Executors of Pixley*, 7 Johns. 249. In that case the declaration stated that the testator, on the 22d of February, 1802, by his writing obligatory, sealed, etc., promised and agreed with plaintiffs, in consideration of \$400 to him paid, to convey to the plaintiff, on or before the 1st day of December

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then next, one certain lot of land, lying, etc., and if the said lot of land should be appraised over the sum of \$400, etc., same was to be made up to the testator, and if it was appraised under \$400, the sum which it fell short was to be deducted out of certain notes, etc. In the case before the court, Courcier and Ravises covenanted forthwith to deliver goods estimated to be worth more than \$11,000, which goods were actually delivered at the time of making the contract; within six months after that time the land was to be valued; at the end of the year it was to be conveyed; if the valuation exceeded the amount of goods received, the plaintiffs were to secure the difference, to be paid in goods on demand; but if the valuation fell short of the amount of goods received, then payment was to be secured by the defendant.

344] \*There appears to be a great degree of similarity in the features of the two cases. In one, \$400 was paid in land; in the other, more than \$11,000 was to be paid, and actually was paid upon the execution of the contract. In both, the land was to be valued and conveyed at a subsequent period, and in both, if the valuation exceeded the amount already paid, the vendee was to make up the difference, in the one case by payment, in the other by securing payment; and if the valuation fell short of the amount already paid, then the difference to be accounted for by the vendor. It may be said that in the case cited there was no agreement that the amount beyond the \$400 should be paid at the time the conveyance should be executed. But what say the court? "Assuming that there was a covenant on the part of the plaintiff to pay for the amount of the appraisement beyond \$400, yet it only went to a *part* of the consideration, and the rule is settled that where mutual covenants go only to a *part* of the consideration, and a breach of that part may be paid for in damages, the defendant shall not set it up as a condition precedent. The covenants in such case are to be considered as independent." "The damages sustained would be very unequal if the covenant of the plaintiff was held to be a condition precedent. He, in the meantime, loses his \$400, and the testator might not lose anything. The plaintiff had in part (at least) executed the bargain by paying the \$400, and the testator ought not to keep that sum without conveying the land, because, that *possibly* there may be a surplus to receive, and he may sustain some damage by the plaintiff not tendering that surplus. This would be unjust. He is bound to convey, and

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he may then resort to his action if a surplus should be found to exist upon the appraisement."

The principle decided, and the reasoning adopted, apply strongly to the case under consideration.

The mutual covenants go only to a part of the consideration. More than \$11,000 was actually paid, and additional payments were to be made or secured, provided the land should be valued at an amount greater than what was then paid. In this case it may be said that the damages would be unequal if the covenant of the plaintiff was held to be a condition precedent. He would lose his \$11,000, \*and Graham *might* not lose anything. In [345 this case the plaintiff has in part (*at least*) executed the bargain by the payment which he has made, and in this case had Graham at the end of the year conveyed the land, and had the plaintiffs refused to secure the payment of the surplus, he might have had his action to receive that surplus.

, If the cases cited are law (and the principles by them decided appear to be consistent with reason, justice, and common sense), I should be led to the conclusion that the covenants in the case before the court must be regarded as independent. But as the decision of the court upon the motion for a nonsuit is not founded upon this idea, it is unnecessary to give a definite opinion upon the point. The defendant contends that the covenants are dependent, or, at least, that they contain *mutual conditions* to be performed *at the same time*. The plaintiffs in their declaration have thus treated them, and have alleged performance on their part, or a readiness and offer to perform. Upon the trial, these averments in the declaration were not proven, and if by the pleadings they were properly put in issue, the motion for a nonsuit should have prevailed.

Whatever is admitted in pleading need not be proved, and whatever is not denied may be considered as admitted. In covenant greater strictness is required in pleading than in most other actions. If the defendant relies upon matter of excuse for the non-performance of his covenant, he must plead it specially. If he would excuse himself on the ground that the plaintiff hath not performed a condition precedent, this must be pleaded specially. 1 Chitty's Pleading, 483. This form of pleading is adopted in the books, and I find no case where the plaintiff, for the purpose of supporting his action *merely*, has been compelled to prove the performance of a precedent condition, unless the fact of performance



was in some shape denied by the plea. If the defendant relies upon his own performance, it must be specially pleaded, and under this plea I presume it will not be contended that the plaintiff would be bound to prove the performance of a precedent condition. The performance of the defendant, and not of the plaintiff, is the thing in issue, and for the purpose of trying that issue the performance of the plaintiff is admitted.

346] \*In the present case the plea is *non est factum*. What is put in issue by this plea? Counsel for defendant say that this is a general issue plea, and that a plea of the general issue puts the plaintiff upon proof of all the material averments in his declaration. This, as a general rule, is undoubtedly correct. But in some actions, it is said in the books, there is no general issue. And in some actions the general issue plea is not considered as a denial of all the allegations of the declaration. In replevin, for instance, the plea of *non cepit* puts in issue nothing but the taking of the property. Under that plea the plaintiff is not bound to prove any interest in the property taken. Yet this is a general issue plea; and what is denied in an action of debt or covenant by the plea of *non est factum*, except the sealing and delivery of the deed upon which the action is founded. Chitty, in his treatise on Pleading, vol. 1, p. 116, says that this plea puts nothing in issue but the sealing of the deed; and Espinasse, in his Digest, 306, that the issue is only upon the existence or goodness of the deed. For this dictum he cites 2 Black. 1152. The doctrine laid down by Chitty and Espinasse is supported by this and other adjudged cases. *Muscett v. Ballet*, 2 Cro. 369; *Bishop v. Brook*, Com. Rep. 303; *Gardner v. Gardner*, 10 Johns. 47, are full in point, so that the counsel for the defendant must be mistaken in supposing that this is a denial of all the material averments in a declaration, for most declarations in covenant contain other averments than the single allegation of the sealing and delivery of the deed. But are not these opinions and decisions consistent with reason and common sense? One principal object of pleading is that the parties may have notice of the grounds of complaint and defense upon which they severally rely. The plaintiff in his declaration alleges, among other things, that the deed declared on is the deed of the defendant. To this declaration the defendant pleads *non est factum*; in other words, he denies the existence or goodness of the deed. By this plea he apprises the

plaintiffs that he shall contest the validity of the deed in some way; but does he apprise him of any other defense? Under this plea the defendant may show that the deed was void at common law *ab initio*; that it was delivered as an escrow, or that it became void \*after it was made, and before the commencement of [347 the suit, by erasure, interlineation, alteration, etc. Evidence of this description the plaintiff must expect to meet. But would proof that the plaintiff had not performed a precedent condition in the same deed by him to be performed, be evidence that the deed was not the deed of the defendant; or would it destroy its validity? Evidence of this description under a proper state of pleading might and would destroy the plaintiff's right of action, but would not prove that the deed was void. This idea, with respect to the operation and effect of the plea of *non est factum*, seems to have been generally entertained by pleaders, and therefore, in many instances, we find this plea connected in the same case with a special plea that a plaintiff has not performed a condition precedent. If a plea of *non est factum* put such performance in issue, such practice would not have been introduced. And it is because the operation of this plea is thus limited, and because there is no one plea that puts in issue every material allegation in a declaration in covenant, that some writers on the subject of pleading have said that in this action there is, properly speaking, no plea of the general issue.

In the case under consideration, the defendant having pleaded as before stated, the cause was submitted to the jury. The plaintiffs introduced in evidence the deed, the validity of which was not questioned. He introduced further evidence to prove the amount of damage sustained. The testimony was competent, and having it before them, the jury could not have found that the deed was not the deed of the defendant, but must of necessity return a verdict for the plaintiffs upon the issue joined; and the court could not with propriety have directed a nonsuit.

Having disposed of the question upon the point reserved, I will now proceed to consider the motion for a new trial.

On the trial of the cause, the counsel for defendant insisted, that by a just construction of the contract, Cincinnati was the place where the same should have been performed. And as plaintiffs had neither averred in their declaration, nor shown in proof, that they were ready, either by themselves or agents at Cin-

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cinnati, to perform or accept a performance from the defendant, 348] therefore, they were not entitled \*to recover, or, if entitled to recover, could only recover nominal damages. The court, however, were of opinion, and so instructed the jury, that the plaintiffs, under the pleadings, were entitled to recover the full amount of damages sustained. It is said that in this opinion the court were mistaken. As to the rights of recovery, sufficient has already been said. If the declaration was defective, this should have been taken advantage of by demurrer, or (if the defect was not cured by verdict) by motion in arrest of judgment. By craving oyer, the deed itself might have been made a part of the record. The defendant having relied upon the plea of *non est factum*, and the issue being found against him, no sufficient reason can be assigned why the plaintiff should not recover the damages proven to have been sustained. These damages were the value of the merchandise delivered, estimated at *eleven thousand four hundred and eighteen dollars and thirty-two cents*. This amount was sought to be recovered, together with the interest, and to this they had a right.

An attempt has been made to assimilate this case to a case standing on default. The reason assigned for this similarity is, that the plea was not sworn to according to the statute. But in this case, as well as every other where a plea is filed, there was an issue to be tried. That issue must be found either for plaintiffs or defendant. In a case standing on default, the jury have nothing to do but to assess the damages.

That the defendant did not rely for his principal defense upon the plea filed, we may well conclude, from the circumstance that several notices are attached to and connected with the plea. The principal object of pleading *non est factum* seems to have been to lay the foundation for giving notice, and to save the trouble of special pleading with technical precision. These notices are, in substance, that the defendant will, on the trial, prove performance, tender of performance, readiness and offer to perform, etc., and also that the plaintiffs refused on demand to deliver the goods and merchandise which had been selected, and that the merchandise delivered was of less value than *eleven thousand four hundred and eighteen dollars and thirty-two cents*. In support of the notice connected with his plea, the defendant gave in evidence the facts par- 349] ticularly set forth in the \*motion, and the court instructed

the jury as therein stated. Was there anything incorrect in this opinion, or any mistake as to matter of law?

The first position of the court was, that no continuance of *possession* for any time less than where the statute of limitations would operate to bar a recovery in ejectment, was sufficient to warrant the presumption of a deed. The authorities cited by counsel show that continuance of *possession* for a less period of time, accompanied by *other circumstances*, might be sufficient to warrant this presumption. In *Bealy v. Shaw* and others, 6 East, 215, Lord Ellenborough says, "I take it, that twenty years exclusive enjoyment of the water in any particular manner, affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of Parliament. But less than twenty years enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right." From this I infer, that *possession alone* would not be sufficient to warrant the presumption, unless continued for twenty years; and, if so, the court were correct. The *possession* under Dayton had continued for more than twenty years, and this possession was accompanied by circumstances which would justify the jury in presuming, and they probably did presume, a title in that individual. But suppose the expression used by the court upon this point was not sufficiently guarded, or even that there was a mistake as to the law, could this circumstance have made any difference in the final decision of the case? If it would not, to grant the motion for a new trial would be worse than useless.

The next position assumed by the court was, that if the title was found to have been in Dayton, then no title would be sufficient to satisfy the terms of the contract, except a complete connected paper title from Dayton to the defendant, Graham. By the terms of the contract, Graham covenants that he will "by a good and sufficient deed of conveyance and assurance in the law, well and sufficiently, grant, convey, and assure the aforesaid tract of land, with the appurtenances, unto the said Andrew Courcier and Frederic Ravises, their heirs and assigns, in fee simple, clear of all incumbrance, the title to the same to be indisputable."

\*The evidence adduced and admitted by the court showed [350 a paper title from Dayton to Riddle, and from Vanhorne to the defendant. What was there to prove title in Vanhorne? Possession, and nothing but possession, unless it be the fact that he was

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put in possession by Riddle. This fact hardly conduces to prove title. Graham, then, could trace his title back no further than to Vanhorne, whose only evidence of title consisted in a possession commenced in 1803, and which, at the time of the tender, had continued in himself and those claiming under him for about eleven years. Under these circumstances, had Graham conveyed the land to the plaintiffs, and had they accepted the conveyance, would it have vested in them a "title to the same indisputable?" Most clearly it would not. Here was an important link wanting in the chain of title. From the evidence before the jury, the fee was vested in Riddle. And had Riddle commenced his action of ejectment against Graham, the latter would have been without defense. Will it be said that Riddle would have been estopped by his deed attested by one witness? It must be recollected that this deed was not in evidence. It had been excluded by the court, and there was nothing submitted to the jury to prove that the title had ever passed from Riddle. In this situation of the case, I can have no doubt that the court were correct in instructing the jury that there must be a complete connected paper title from Dayton to Graham, to satisfy the terms of the contract.

The deed from Riddle to Vanhorne was properly excluded. By the first section of the act providing for the execution and acknowledgment of deeds, passed February 14, 1805, it is provided that all deeds for the conveyance of lands, etc., "shall be signed and sealed by the grantor, in the presence of two witnesses, who shall subscribe the said deed of conveyance, attesting the acknowledgment of the signing and sealing thereof," etc. This law was in force at the time the deed from Riddle purports to have been executed. This deed was defective, inasmuch as it was attested but by one witness. The law was not complied with. It could convey at most only an equitable interest. The plaintiffs were to receive a legal estate, free from incumbrance, the title to which 351] should be indisputable. This deed did not convey such an estate; of course, it could not be received in evidence.

On the subject of damages, the jury were instructed that the price fixed upon the merchandise in the covenant must be the governing principle, and that it was not competent for the defendant to contest the justness of the price. In this opinion it is insisted that the court mistook the law, and the case of *Baston v. Butler*, 7 East, 479, is relied on as an authority to show this mis-

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take. In that case the plaintiff declared as upon a *quantum meruit*, for work and labor done and materials found. There had been no previous contract as to the price to be given, and the claim rested solely upon the worth or value of the work. The court decided that it would be proper to permit the defendant to prove that the work was less valuable than claimed to be by the plaintiff; and they go so far as to intimate that when there has been a particular price agreed upon, for which work and labor shall be done, the defendant having given notice, may show that the materials are bad and the work defectively done. But in cases of this description, the decisions have been variant, although the rule appears to be finally settled, as stated by Lord Ellenborough in *Farnsworth v. Garrard*, 1 Campbell, 28: "That if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go the amount of the plaintiff's demand, leaving the defendant to his action for the negligence. The claim shall be co-extensive with the benefit."

The case of *Basten v. Butler* would, in some degree, compare with the case before the court were this a *quantum valebant*, and had there been no previous agreement as to the price of the goods. In this case, however, the goods were estimated at a specific price. This price was agreed upon by the parties. The defendant agrees to pay this price at a future period in land if he is satisfied with the valuation. The valuation is made, and he assents to it; but he fails to make the conveyance, and thus remains debtor for the goods. No fraud was practiced; none was pretended. He agreed to the price of the goods with a full knowledge of their character; and it is not competent for \*him now to say that they were [352 of less value. There must be judgment on the verdict.

Judges PEASE and SHERMAN concurred.

Judge BURNET, having been counsel with Graham, did not sit in this cause.

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ELISHA FITCH v. ELI SARGEANT.

*Special Contract.*

When a special contract is put an end to by act of the parties, the plaintiff may recover on general counts.

THIS was an action of assumpsit. The first count in the declaration stated in substance that, in consideration that the plaintiff, at the request of the defendant, had before that time leased and let to the defendant a certain house and lots of ground in the town of Pike, for the term of one year, together with the ferry and boat near said town, the defendant promised to take proper care of the premises, to attend the ferry, and pay the plaintiff as rent therefor a large sum of money, to wit: The sum of two hundred and twenty-five dollars.

The second count, after stating the contract the same as in the first, alleged a promise to pay the plaintiff for the enjoyment of the premises so much as he reasonably deserved to have, etc. The declaration also contained general counts. The breach alleged was injuring the premises and non-payment of rent. The defendant pleaded the general issue, with a notice of special matter.

The contract, as proved by the plaintiff's witnesses, was that Fitch rented to Sargeant the house, lots, and ferry, for one year, at \$200. That the defendant said if he made enough to enable him to pay more rent he would do it; but \$200 was the rent agreed upon. The plaintiff also proved that the property had been abandoned by the defendant before the expiration of the year, and had received some injury.

The defendant proved that after he took possession of the premises and ferry, the lessor's right to the ferry was decreed by the court of common pleas to another person, and the lessee was 353] entirely deprived of the use of the ferry. \*Upon which the defendant sent the plaintiff notice that as he had lost the ferry he could not remain in the house and pay the rent, but should leave it. The plaintiff directed a third person to take charge of the house if the defendant should abandon it. The defendant soon

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after left the premises, and they were taken charge of by the person spoken to by the plaintiff.

The defendant moved the court to direct a nonsuit upon the ground of variance between the contract laid in the declaration and that proved. But the court directed the cause to proceed, and the jury found a verdict for the plaintiff for an equitable proportion of the rent, taking into consideration all the circumstances.

The cause was tried in Pike county before Judges Hitchcock and Burnet. The defendant moved for a new trial upon the ground of misdirection in refusing to direct a nonsuit, and the motion was adjourned here for decision.

CREIGHTON and BOND, in support of the motion :

In an action of assumpsit, upon a special contract, the declaration must state the contract truly and correctly. A material variance is fatal. *Ld. Raym.* 735 ; 2 *East*, 2, 4, note A ; 1 *Bos. & Pul.* 351 ; 2 *Bos. & Pul.* 116.

The declaration sets out a positive, unconditional agreement to lease the house, lots, and ferry, for one year, at \$225. The proof is an agreement to lease for \$200, and to pay more if the profits of the business will justify it. Here is a material variance: 1. In the sum agreed to be paid ; and 2. In the omission of the contingency upon which a greater sum was to be given.

The plaintiff can not recover upon the special agreement laid in his declaration, because he has not proved it. He can not recover upon his general counts, because he has proved an open subsisting special agreement, under which his right to recover arises, and upon which he must proceed. This contract has not been executed by the parties, or put an end to, or abandoned ; for when the defendant left the premises, it was no abandonment of the contract ; on the contrary, he proceeded upon the proposition that the contract was still in force ; that the plaintiff was unable to \*make it good ; and that therefore, by its terms, he was [354 not required to proceed in further executing it.

The court ought to have directed a nonsuit, and not having done so, a new trial should be granted.

DOUGLAS, for the plaintiff :

There is no material variance between the declaration and proof ; the \$225, as the rent of the ferry, is laid under a *videlicet*. In



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this form of pleading the party is not confined to any particular sum. No case can be cited where, upon a general count, the party was confined to it without a *scilicet*. This count is in its nature general, as well as the one succeeding it.

In the case of *Arnfield v. Bate*, 3 Maule & Selwyn, 174, Lord Ellenborough observes: "And though the two sums came very near to each other, yet that would not help the plaintiff; *but he ought to have laid the sum under a videlicet, and then he would not be bound by any particular sum.*" In the case of *Durston v. Tuthun*, there cited, is full to the same point.

Nor does the contingency of paying a greater sum, if the profits of the ferry would justify it, alter the state of the case. This being not specified, could well be recovered under the general counts.

In the case of *Baptiste v. Cobbold*, 1 B. & P. 7, plaintiff declared upon an agreement for 52l. 10s. rum money, and gave in evidence a note for that sum, with an additional stipulation of a pint of rum per day; it was held to be no variance.

2. If the contract was put an end to, the authorities are clear that the plaintiff is entitled to recover upon a *quantum meruit*; here the act was on the part of the defendant.

The rigid rule which formerly obtained upon the subject of special contracts and general counts, has been deservedly compared to the inflexible one of non-amendment in former ages. The progress of the science has relaxed it. The rule as now settled is: "That when the terms of a special agreement to do a certain thing for a certain sum, have been performed by the plaintiff, the law raises a duty in the defendant, for which *indebitatus* assumpsit will lie." *Kelly v. Foster*, 2 Binney, 4; *Jacobson v. Ex'rs of Legrange*, 3 Johns. 199.

355] \*Where the act is consummated, let it be never so special, the law varies the duty, and such will be found to have been the general course of decision. The cases cited by defendant's counsel were upon executory contracts, and the confusion seems to have arisen from the want of a due consideration to contracts executory, and contracts executed. The case of *Penny v. Porter*, 2 East, 2, is a leading case upon the subject, but it was for breach of an open contract in not delivering wheat. In *Kelly v. Foster*, Chief Justice Tilghman, after a full view of the authorities, observes, "that he is always glad to find authority for supporting the verdict of a

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jury, where the merits appear to have been fairly before them, and for supporting that kind of pleading which is attended with the least difficulty."

By the COURT :

A majority of the judges are of opinion that the special contract was put an end to by the concurrent act of the parties. The defendant sends word to the plaintiff that he can no longer retain the possession of the premises, but intends to abandon them. The plaintiff directs a person, in the event of such abandonment, to take charge of them. After this, the defendant leaves the house and lots, and the possession is resumed by the plaintiff. The special contract is thus given up, and the right of the plaintiff to recover rent for the time the defendant enjoyed the premises must be decided by the same rules as if the possession had been originally taken upon an understanding that the defendant should pay what was reasonable. The verdict of the jury is founded upon this view of the subject. Substantial justice has been done between the parties, and a new trial ought not to be granted.

Judge BURNET's dissenting opinion :

I dissent from the opinion of the court, given in this case, from a conviction that the variance between the contract proved, and that set out in the declaration, is material and fatal. The sum laid in the declaration, as the consideration of the lease, is \$225. The sum proved by the witnesses is \$200 certain, and more if the defendant could afford it.

\*I do not perceive any resemblance between this case and [356. those cited by the plaintiff. This contract has not been performed by either party. Fitch did not secure to Sargeant the use of the ferry for the term stipulated, in consequence of which Sargeant left the premises before the term expired, under a belief that he had a right to do so. The contract is open, and the question between the parties seems to depend on its legal import, and the effects of their acts under it. The plaintiff contends that he has a right to recover the full amount of rent stipulated to be paid for the term, and also damages for breach of the engagement to keep the premises and boat in repair, and to deliver them in good order. The defendant contends that, in consequence of the loss of the

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ferry, he was not bound to perform on his part, and that he is not answerable for rent or damage.

I do not see how these questions can be settled on the general counts, or how such questions could exist, if the contract had been either abandoned or performed. If the plaintiff had proved the contract precisely as he has stated it, the subject of controversy would have been the loss of the ferry and the damage done to the property, and whether the former exonerated the defendant from the payment of the whole or a part of the rent, and whether the latter entitled the plaintiff to damages, and, if so, to what extent?

These questions arise out of the contract, and must be determined by a reference to it. Their existence shows that the contract is open and disputed, and the variance between the contract charged, and that proved at the trial, shows also that the terms of the contract are disputed.

I know of no exception to the general rule that a contract open and disputed must be declared on specially. As Fitch was bound to secure to the tenant the use of the ferry for the whole term, when he failed to do so, he broke the contract. The defendant has also failed to perform it, by losing the boat, injuring the property, and withholding the rent, or a part of it; consequently, neither party has performed. The removal of Sargeant from the house, before the expiration of the term, was no abandonment of the contract; it was neither more nor less than a declaration that, 357] having lost the ferry, he was not bound to perform, the \*correctness or incorrectness of which depends on the terms of the contract. This fact does not assimilate the case to that class of cases in which the plaintiff abandons and sues to recover back his deposit, nor to the cases in which the plaintiff, having fully performed, resorts to his general counts.

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Buck v. Waddle and McGarraugh.

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## BUCK v. WADDLE AND MCGARRAUGH.

*New Trial—Special Contract—General Counts.*

If parol contract for sale of lands is not executed by vendor, the money paid may be recovered back.

Where substantial justice is done by a verdict, new trial will not be granted upon technical grounds.

THIS was an action of assumpsit. The declaration contained the common money counts, in support of which the plaintiff offered the deposition of Joseph Ronck, which stated, in substance, that deponent had sold to defendants eight lots of ground, for which they owed him \$1,200; that the defendants were to pay the money secured by a mortgage on the premises, previously given by deponent to John T. Barr, for about \$800. That after that contract, and before the execution of the deed, the defendants told deponent they had sold one of the lots to Samuel Buck, the plaintiff, for \$125, and that Buck was to pay the money to the deponent for the defendants' use; that he had understood from both parties that the defendants were to cancel and lift the mortgage, so that it should have no lien on the lot sold to Buck; that the defendants directed him to make a deed for the lot to Buck, which he did on Buck's securing the \$125; that, on a settlement with the defendants, he gave them a credit for the \$125; that he had no interest in the event of the cause, for Waddle, McGarraugh, and Buck knew the situation of the case as well as he did, and Buck gave him a general release on the 15th July last, and had since given him a special release. The deed to Buck was a general warranty deed. The releases referred to in the deposition were produced. By the first, "Buck releases to Ronck, his heirs, etc., all demand in law or equity against him, by reason of any act of him, said Ronck, to this day." The second releases "all right of action against [358 him on account of any real estate by him deeded to me, and allow him to convey the same to any one else." The deposition was objected to, but the court being divided on the question, it went to the jury. The plaintiff then proved the mortgage from Ronck to

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Barr, and produced the record of a judgment by *scire facias* on the mortgage, in favor of Barr against Ronck, and an execution on the judgment, by which it appeared the lot had been sold by the sheriff, and purchased by the defendant, Waddle. A witness was then called, who proved that after the above transactions a blacksmith wished to rent the lot; that the defendant, Waddle, said Buck had no right to rent the lot till he paid the expense of the sheriff's deed; that he could have the lot if he would pay that expense. He thought Waddle also said that he himself had no right to rent it.

The second witness testified that Buck lived on the lot at least one year; that he afterward rented it to a person of the name of Legore; that the witness himself had rented it of Buck for ten months, for which he paid him \$20; that he was still occupying the lot, but under no particular person; that no one molested him.

The third, and last witness, testified to the possession of Buck, and that Wilson had rented from him.

No testimony was offered to show the plaintiff had divested himself of the title derived from Ronck, or that he had given notice of his intention to abandon the contract, other than by the commencement of the suit.

On this evidence, the case went to the jury, who found for the plaintiff.

The defendants moved to set aside the verdict, and grant a new trial: 1. Because the deposition of Ronck was improperly admitted. 2. Because the testimony presented a case which did not entitle the plaintiff to a recovery in this form of action. The court were divided, and the decision reserved, etc.

KING, in support of the motion:

If the release to Ronck rendered him a competent witness, on the ground of interest, yet his testimony was improperly received, because irrelevant.

359] \*The contract between the parties, upon which the action is founded, as proved by Ronck, is a parol contract for the sale of land, and is within the statute of frauds. One stipulation in this contract was, that the defendants should remove the incumbrance of the mortgage. This stipulation remains unexecuted, and the contract is therefore executory, and no action can be sustained upon it.

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Upon this latter circumstance the second exception to the plaintiff's right of recovery in this particular form of action is also grounded. It is agreed that when a contract is executed, or put an end to by other act of the parties, the money paid upon it may be recovered back in the common counts. But if the contract continue open, he must proceed upon it, and recover damages for the breach. 1 Term, 133. But one party can not, at his discretion, put an end to a contract for any default of the other party. This can only be done where both parties can be placed in *statu quo*. 5 East, 449.

In this case Buck agreed to pay Ronck and take his deed. Waddle and McGarraugh agreed to pay off the mortgage, so as to remove the incumbrance. Buck paid Ronck, obtained his deed, and took possession. The defendants did not pay off the mortgage, and in this violated their agreement. But this violation could not give Buck a right to rescind the agreement, and recover back his money. Such a course would not place the parties in the situation they were in before the contract. In virtue of it Buck had obtained and held Ronck's deed, upon which, after eviction, he could have his action against Ronck. He held, and for some time had enjoyed, the possession. By rescinding the contract, and recovering back his money, he would retain all these advantages. By being put to his special action on the agreement, they would be estimated in ascertaining the damages he should recover.

But if the facts of the case would have authorized Buck to rescind the contract, and claim his purchase money paid, he could not do this by simply suing out his writ. A release of the covenants of the deed, and a restoration of the possession, with an express declaration of abandonment or rescission, ought to have been made. Instead of this he retains both possession and deed to this day. There is no \*case in which the party must perform a [360 series of acts, in the rescission of a contract, where he has been permitted to abandon it, and recover on the money counts. There is no sound reason or good principle which now warrants such a precedent.

LEONARD, for the plaintiff:

If we were seeking to enforce a parol contract for the purchase of a tract of land, there might be some force in the objection that the testimony of Ronck proves a case within the statute of frauds.

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But if money is paid on a parol contract of this character, and the vendor rescinds that contract by refusing to execute it, this objection can not be urged against the party recovering back the money paid. 5 Johns. 85; 20 Johns. 338.

On the second point, the rule is that wherever there is a special contract not under seal, and the contract is completely executed, the plaintiff may recover in the general counts, and is not driven to a special count. *Bank of Columbia v. Patterson's administrators*, 7 Cranch, 303; 2 Saunders, 360, note. Where, also, the defendant rescinds the contract, or where the plaintiff, by the terms of the original bargain, may put an end to the contract, which he accordingly does, the general counts are sufficient; and the reason assigned by Buller, in his *Nisi Prius*, 139, for the rule in the instance where performance has been had, is, that "PERFORMANCE raises a duty for which a general *indebitatus* assumpsit WILL LIE."

The cases to support the position, that where the contract has been rescinded, general counts are sufficient, to which I will refer the court, are 5 Johns. 85, before cited; *Giles v. Edwards*, 7 Term, 181; *Towers v. Barret*, 1 Term, 133; 15 Johns. 475; also, same book, 503. The last case clearly explains the reasons of the rule. A parol contract was made for the purchase of a tract of land, and money paid thereon. In an action brought by the purchaser to recover back the money thus paid, it was determined he should recover, because the contract was void by the statute of frauds, and therefore the money was paid without consideration; and where the contract is rescinded, it is the same as 361] if no contract had ever existed. And it appears \*from the cases, that the party may in some instances proceed on the special contract, or on the general counts at his option, as in the case where the plaintiff has fully performed his contract, or where he has partly performed, and been prevented by the defendant from completing the residue thereof; or where he has been entirely hindered by the defendant from the execution of the contract, or where the defendant has only in part completed his contract, and the plaintiff has entirely completed his. In that case, it is at his election to proceed with the special contract, or, treating the contract as rescinded, go on the general counts. Now all contend that in this case Buck might treat the contract as put an end to, and go on the general counts for the recovery of the money. For the purpose of fulfilling his engagement, Buck paid this money for the use of

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Waddle and McGarraugh, and obtained a deed. But Waddle and McGarraugh stipulated to extinguish a certain lien existing on the land, with which stipulation they failed to comply. What is this but the case in 7 Term Reports. There the plaintiffs paid twenty guineas; the defendant in part performed his contract, but not entirely. The court allowed the plaintiff to recover back his money on general counts, the defendant's neglect authorizing the plaintiffs to consider the contract rescinded. In 15 Johns. 475, the plaintiff sold defendant a quantity of whisky, and defendant paid the plaintiff in certain notes, representing the same to be good. The contract was special, and reduced to writing. The whisky was delivered in pursuance thereof; the notes turned out to be good for nothing. Here the court held the plaintiff might recover on the general counts; the contract was put an end to by the acts of the defendant. The only difference in the last case and this is, that there was a misrepresentation, and here a contract. Suppose, in the case now before the court, the defendants had represented there was no mortgage on the premises; that they had extinguished it; then, according to the New York case, the plaintiff might have sustained his action on the general counts. But shall it be said because he engaged to extinguish the mortgage and failed, such counts are not good? In the case in 15 Johns. there was a special agreement; but the fraud enabled the plaintiff to treat it as if there had been no agreement. So here there was a special contract to do a certain act, which act was the consideration of the payment of money; and that act not being done, we are entitled to consider the contract terminated by the defendant, and recover back our money paid as a consideration that has failed. A special count might there have laid on the fraud, and so here on the contract; but we have seen that this circumstance will not preclude us from recovering on the general counts. But if this view of the case is not deemed by the court as satisfactory, there is one which has always struck me as decisive. Waddle and McGarraugh stipulated to extinguish this mortgage. Instead of so doing they permitted the identical lot to be sold, and the estate of Buck therein to be divested, and became the purchasers and claimed the lot as their own by right, interfering with Buck's exercise of ownership. Have they not by these acts rescinded the contract? Would not their permitting others to have become the purchasers, thus divest-



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ing Buck of the identical thing for the purchase of which he paid his money, have been a rescission of the contract? Suppose we had bought a horse and paid our money therefor, and some other held a mortgage of the horse for a sum of money, and the vendor had agreed to pay off that mortgage, but instead had not only suffered another, but himself had bid in the property on the sale—could not the vendee of the horse, after he was divested of his property, **THE IDENTICAL THING**, by the vendor, treat the contract as rescinded, and recover back the purchase money? Admit, if you please, that in case there had been a warranty of the soundness of the horse, and the horse was ailing, that in that case the vendee must resort to a special count; yet where the horse himself, the identical thing for which the purchase money was paid, was taken from the vendee by the vendor, no matter by color of what plausible reasons the act was done, I can not doubt but the vendee might consider the contract as rescinded, and recover his purchase money back again on the general counts for money had and received. See the argument of Erskine in *Towers and Barret*, 1 Term, 133. See also 5 Johns. 85. I sell you my horse; I contract to pay off a lien existing on him; the sale of the horse, and the agreement **363]** to pay off the lien are one thing; they constitute \*the consideration for the payment of the money; you pay me the money; I do not deliver the horse; you can get back your money most assuredly in an action for money had and received. See the cases before cited. I deliver the horse, but suffer, nay, am active to take him from you by the lien; you are divested of the identical thing for which you paid the money; the whole contract is at an end; it is the same as if the horse had never been delivered. You may then most certainly recover back the money you have paid, and are not driven to an action to recover only the amount of injury done you by taking away the horse. The horse may have sunk three-fourths in value, or may not have been worth the one-fourth paid for him. He might suit your taste, and yet, divested of the identical article purchased, you are to recover only the value of that article in the general market. This is Buck's case exactly, so far as it is a matter now submitted to the court. The effect of the evidence of *S. Lurfbourrow* and others was submitted to the jury, and lies in their province exclusively.

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**By the Court:**

We are all agreed that there is nothing in the first ground assigned for a new trial. It is well settled in New York and in Kentucky, that where money is paid upon a parol contract for the sale of land, and the vendor refuses or neglects to execute the contract, the money paid may be recovered back, and this stands upon too plain a principle of justice to be disputed.

Upon the second ground assigned, a majority of the court is of opinion that a new trial ought not to be granted. The defendants contracted to remove the lien of the mortgage from the lot they sold. They did not do so. On the contrary, they possessed themselves of the paramount title derived under the lien they agreed to extinguish, and refused to confirm it to the plaintiff unless he would make a new purchase. For the principle upon which they could demand a dollar for making a new deed, is none other than that having it in their power, they would insist upon a new bargain. Whether this amounted to an abandonment of the first contract was left to the jury, who have found in the affirmative. It is not pretended but that upon a special \*count, rightly framed [364] upon the contract, the plaintiff ought to have recovered. Substantial justice has therefore been done, and where that is the case, a new trial ought not to be granted.

**Judge BURNER's dissenting opinion:**

In stating the reasons that have induced me to dissent from the opinion expressed by the court in this case, I shall confine myself to the second reason filed for a new trial, viz: that the testimony does not support an action for money had and received. The case appears to be this. Ronck, being the owner of certain lots in the town of Washington, mortgaged them to Barr, and afterward sold them to the defendants, who agreed to satisfy the mortgage. The defendants afterward sold one of the lots to the plaintiff for one hundred and twenty-five dollars, who, by the agreement, was to pay the purchase money to Ronck, and receive from him a deed, the defendants promising to discharge the mortgage. The plaintiff paid the purchase money, and received his deed, according to contract. The defendants did not satisfy the mortgage, as they were bound to do, in consequence of which the lot was sold on a judgment obtained on the mortgage, and purchased in by one of the defendants for the benefit of the plaintiff, who was required

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to pay the expense of drawing the deed. The plaintiff took possession of the lot at the time of the contract, lived on it himself, and rented it to different persons. He still holds the deed; he has not restored the possession to the defendants, or offered to do so; nor has he given notice that he considered the contract at an end. On this state of the case, the question to be decided is, whether he can now recover from the defendants the money paid to Ronck in an action for money had and received. It is well settled that an action of assumpsit may be sustained on a sale, either for the price of the thing sold, or to recover back the purchase money, when there is a defect in the article sold, or a fraud in the vendor. It is also settled, that in every sale the vendor is supposed to have a good title, and if it turns out that his title is defective, the vendee may waive the contract, and recover back the money paid; and it is admitted that this principle applies to contracts for the sale of 365] real estate, as well as of goods \*and chattels. 5 Burr. 2639; 2 Black. 1078. In the case before us, it appears that the lot sold to the plaintiff was incumbered by a mortgage, of which he had notice, and in consequence of which it was afterward sold by the sheriff. The plaintiff, therefore, had a right to waive the bargain, and recover back the purchase money, unless his title had been otherwise secured. Without stopping to inquire whether the offer of a deed from the sheriff, on condition of paying the sum of one dollar, under the circumstances of this case, was not such a security of title as would bar him from the right of abandoning the contract, I will proceed to the inquiry, whether he has in fact waived the bargain, so as to entitle himself to this action, or whether, as the case stands, he was not turned over to his special action on the contract. In cases where the article sold has not been delivered, if there be a defect in the thing itself, or a fraud in the vendor, the vendee, by giving notice that he declines the bargain, may recover back his money in this form of action. But if possession has been given, the action for money had and received can not be maintained till the thing purchased has been restored; for till that be done, the contract is not at an end; it remains open, and the proper remedy is an action founded on the contract. Until the contract be terminated, its stipulations are matters that may be controverted. A contract may contain a warranty, or, as in this case, a promise to remove an incumbrance, and while the contract remains open, these stipulations may be disputed, but they

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can not be tried in this form of action. The plaintiff must resort to the contract. In the case of *Towers v. Barrett*, 1 Term, 133, this action was sustained, but it was on the ground that the property purchased had been returned, and the contract thereby terminated; and it was admitted in that case, that while the contract continued open, the plaintiff could only recover damages, and that for that purpose he must state the special contract, and the breach of it. It was also said by Justice Buller, in that case, that if the plaintiff intended to recover back his money, he must rescind the contract, by returning the property in a reasonable time, otherwise he will be put to his action for damages on the special contract. *Weston v. Downes*, Doug. 23, was an action for money had and \*received. The plaintiff was nonsuited by Lord [366 Mansfield, on the ground that there was a special contract, and that the defendant ought to have had notice, by the declaration, that he was sued on that contract. Buller, Justice, observed that the action would not lie, because the defendant had not precluded himself from entering into the contract by taking back the horses, and that when the contract is open it must be stated specially.

In *Power v. Wells*, cited in the last case, the defendant had warranted a horse sound, which proved to be unsound. The plaintiff having tendered a return of the horse, which was refused, brought an action for money had and received, to recover back twenty guineas paid on the contract, and it was held by the court that the action would not lie. The distinction seems to be clearly settled that when the contract has been disaffirmed, and the property restored, assumpsit will lie to recover back the money paid, but where the contract is open, or the property remains in the hands of the vendee, the action must be on the contract itself. In this case there is nothing in the evidence from which an inference can be drawn that the contract was terminated. On the contrary, it appears to be open, and subject to litigation. The plaintiff accepted, and still holds a general warranty deed for the lot, which is an affirmance of the contract. He was put into possession, has occupied and rented it, and the person now in possession is his tenant, holding over. The evidence of the first witness is nothing more than the expression of an opinion, by one of the defendants, that the plaintiff was liable to pay the expense of the sheriff's deed, and that he had no right to rent the lot till he had done so, or, in other words, that the plaintiff was bound by the bargain to

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do something more than he had done. This language, so far from conveying an idea, that the contract was at an end, could only have proceeded from a conviction that it was opened and disputed. The import of it seems to be, that Waddle, having purchased in the lot, to quiet the title, the plaintiff ought to pay the expense of the deed, as, by the contract, the deed was to be made by Ronck, without expense to the defendants. If Waddle had believed that the contract was at an end, his language must have been very 367] different. But whether this opinion of Waddle \*was correct or not, does not alter the case. The interest to be drawn from it is still the same, that the contract was open and disputed. If it be admitted that the release to Ronck has discharged the action of covenant, so as to make him a competent witness, it does not divest the plaintiff of his claim of title, nor of his possession. He may still consider Waddle as his trustee, and by a decree in chancery, require him to convey the right derived from the sheriff. The existence of such a remedy is a complete negative to the pretense that the contract is closed. The general rule on this subject is, that if there be a special contract it must be declared on. The safety of the defendant requires that he should be informed of the real ground of action. Should this rule be dispensed with, he may be surprised at the trial, and subjected to a judgment that might have been avoided, had he known in time the nature of the plaintiff's claim. He may also be exposed to the danger of a second recovery for the same cause. In *Wear v. Burroughs*, 1 Stra. 648, the plaintiff declared on a special contract, and also on an *indebitatus assumpsit*. At the trial he proved a special agreement, but variant from the one declared on, and the chief justice would not permit him to have recourse to his general counts. The same principle will be found in 1 *Ld. Raym.* 735; 1 *Term*, 447; 4 *Term*, 314. The plaintiff, in this case, having omitted a special count altogether, can not be in a better situation than if he had stated a special contract, and proved one different in substance from that which he had set out. The omission is as fatal as the variance and on the same principle.

See note A, at the end of the volume.

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*Seal and Signature in Blank.*

An obligation to pay money written over a signature and seal made in blank is not operative.

THIS was an action of debt brought upon a sealed bill, and the case made by the pleadings and submitted for the decision of the court was as follows:

The defendant, Harness, being indebted to the plaintiff a sum of money, the exact amount of which was not ascertained, made his seal and wrote his name in connection with it, upon a blank sheet of paper, and authorized the plaintiff to write over it a note for the sum found to be due, and the subscribing witness attested this sealing and subscribing. The paper thus signed and sealed was delivered to the plaintiff an entire blank, who wrote over it, the note upon which the suit was brought, for the sum due, according to his agreement, which it appeared was by parol.

The cause was originated in Ross county, and was adjourned here for decision from the supreme court sitting in that county.

BOND and CREIGHTON, for the plaintiff:

It is well settled that if a person write his name on a blank paper, and deliver it to a third person, to write a promissory note over the signature, such note is obligatory upon the maker, although written when he was not present, and never after assented to by him. Doug. 514; 5 Cranch, 142.

This is but a promissory note, and its character is not varied by the fact that it is written over a signature to which a seal is attached.

Bonds executed in blank have been held to be the deeds of the person executing them. 9 Cranch, 28; 5 Mass. 538. It can not be material whether the name be written upon an entire blank, or, as in the cases cited, subscribed when some material part of the body of the instrument was to be filled up.

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LEONARD, for the defendant:

The writing upon which this action is brought is a deed, and is 369] therefore entirely distinguishable from bills of \*exchange and promissory notes. By the commercial law these may be written over a signature upon a *carte blanche*, and will be binding.

Notes thus executed are mere evidences of parol contracts, and when declared on, and produced at the trial, they are only received as evidence. When the manner of their execution comes to be explained orally, the explanation is perfectly consistent, with their nature and object. The whole testimony only makes out one entire contract by parol.

A deed stands upon a different doctrine; it must be written, sealed, and delivered. "If," says Sheppard in his Touchstone, page 54, "a man seal and deliver an empty piece of paper, or parchment, albeit he do there withal give commandment that an obligation or other matter shall be written in it, and this is accordingly done, yet this is no good deed."

The case here put, is the very case before the court, and if the plaintiff recover, it must be because this ancient doctrine is overruled. No authority of this kind has been produced. The cases from 9 Cranch and 5 Mass. are of a different character. In these cases bonds were written and only left blank in some one particular. In the latter case, the court say expressly that the bond would have been good, if the blank had not been filled up. In the first a new obligor was substituted by erasing the name of one of the original obligors, both in the signature to, and body of the bond. This was done with the consent of the other obligors, and the court held that the bond was not thereby destroyed as to the other obligors. In these cases no just inference can be deduced that a seal and signature to a blank paper could warrant a third person to write a bond over them.

BRUSH and FITZGERALD, on the same side:

If parties can seal and deliver a *carte blanche* that will bind them in one case, it must by the same rule bind them in every other; not only a note for money, but indentures of lease, deeds of conveyance, bonds for the sale of real estate, may be thus executed, and the whole doctrine of deeds may be subverted. The plaintiff's counsel admit that their doctrine ought not to prevail with respect to deeds for land; upon what principle do they make

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a distinction? The \*seal binds for the payment of money [370 absolutely; the consideration can not be controverted. So the conveyance of land transfers the title absolutely. The same consequence and conclusion are involved in both cases. And the law must be the same as to both. A parol agreement may be written over a *carte blanche*, but a deed can not be so written. The law has long been so settled, and ought not to be changed.

HAMMOND, in reply:

There is a wide difference between a deed which constitutes a grant, and one which contains an obligation to pay money or to do some other act. In the first case the deed is an effective operative instrument; in the second, it is but the highest evidence of a contract. In both cases the deed is based upon contract, and in some sense is only matter of evidence. But in the first case it transfers rights *per se*, while in the second it evidences an obligation to be thereafter performed. There is a palpable absurdity in treating instruments of writing so distinct and different in their character as of the same class, to be examined and decided by the same rules.

It is conceded that if a man write his name upon a blank paper and deliver it to another, with a verbal authority to write over it a promissory note for the payment of money, and such note is written, the note is valid. This note, it is alleged, is a mere evidence of a parol contract; that in a suit, the contract must be declared on, and the note introduced as evidence, upon which the jury may find the contract.

In considering this argument it must be remembered that negotiable notes import a consideration, and may be declared on without setting out the original contract. In this respect they have the same effect with a specialty, and yet the argument admits that notes of this character written over a signature in blank are obligatory. In the case of *Dugan v. Campbell*, 1 Ohio, 115, this court determined that all promissory notes might be declared upon, as importing a debt, without reference to the original contract. These facts demonstrate that there is no distinction between promissory notes and specialties. The reason which admits or forbids the principle allowing a note to be written over a signature, is the same in both cases.

\*The law has determined that certain rights shall be trans- [371



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ferred only by a deed in writing, executed in a particular manner. There is strong reason why parol proof should be received of an authority, whereby one man should execute those writings in the name of the other. The authenticity and validity would be placed upon insecure grounds. The very reason of requiring written instruments, executed with peculiar solemnity, would be defeated. Not so where the right may pass, or the obligation be created without any particular solemnity.

A promise to pay money is valid when made by parol, as when made by note under seal. In the latter case the note is evidence of debt, but it is not evidence which can not be defeated by matter *in pais*. As the debt could be created by parol, so an authority to make the written evidence of its creation may rest in parol. No principle is violated; no right endangered; because the whole subject might be created by parol, and be obligatory as if reduced to writing. Neither the writing nor the seal are indispensable to the existence of the right in the person claiming it.

There is no good sense in the distinction between specialties and simple contracts, where they both relate to executory agreements. All the reasons upon which the distinction was originally founded have ceased, and the court ought not to preserve it. There is no necessity for a legislative act to abolish it, any more than there was for overruling the doctrine that a promissory note, not negotiable, could not be declared upon, as of itself importing a debt.

In principle there can be no difference, whether the seal and signature be affixed to a paper entirely blank, or to one in which some material part is blank, and must be filled up before the deed can operate. The opinion of Judge Parsons, 5 Mass. 538, is full to the point, that a party executing a bond, with material blanks in it to be filled up, agrees that this may be done, and that the filling up gives validity to the bond. The cases he refers to support this doctrine, and he certainly adopts it as recognized by the court of Massachusetts. The case is decided upon this ground, although it is added that upon another ground the case was with the plaintiff.

372] \*By the COURT :

The ancient law was well settled that a valid deed could not be made by writing it over a signature and seal, made upon a blank or an empty sheet of paper. We know of no decision by which

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this ancient doctrine is overruled. The case cited by the plaintiff's counsel are of promissory notes not under seal, and of deeds where all the material parts were written at the time of making the signature and seal. They are not analogous. An authority to fill one particular blank falls far short of an authority to make an entire deed. While the distinction between contracts under seal and parol contracts is preserved by our legislature, and by our courts, the different modes of executing them must also be preserved. We are accordingly of opinion that the writing in this case can not be operative, and that the judgment must be for the defendant.

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GEORGE TURNER v. CREBILL AND OTHERS.

*Final Decree—Notice.*

**Final decree in equity is not notice to a subsequent purchaser.**

THE facts of this case were as follows: Before the first Tuesday of August, 1807, the complainant prosecuted a bill in chancery, in the common pleas of Hamilton county, against one A. King and M. Williams, to obtain the assignment of a certificate for the tract of land now held by the defendants. At the August term, 1807, a decree was pronounced by the common pleas, from which an appeal was taken to the Supreme Court.

On the 22d day of September, 1808, the Supreme Court decreed that King and Williams should assign the certificate to Turner; but the decree not to be operative if the complainant did not pay to King a certain sum of money by the first day of June, 1809, provided King and Williams should at any time before that day assign or tender an assignment of the certificate.

King and Williams did not tender an assignment of the certificate, nor did Turner pay the money by the first day of June, 1809. Sequestration was ordered to enforce the decree, which was not executed.

Williams carried the certificate into grant, and conveyed the land, part in 1810, and part in 1813, to the present defendants,

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who had no notice of the decree in Hamilton county, or of the complainant's claim.

On the 1st day of June, 1814, Turner paid the money into the clerk's office of the supreme court in Hamilton county, and upon motion obtained a writ of possession for the land. This writ was superseded. Turner then prosecuted a bill against the defendants, to enforce against them the decree in Hamilton county, charging that they were *lite pendente* purchasers and other ways had notice. The defendants denied notice in their answers, and the complainant's bill was dismissed by the supreme court in Champaign county. Upon this decree of dismissal the present bill of review was prosecuted in the supreme court of Champaign county, and adjourned for decision to this court.

COOLEY, for complainant:

The decree in Hamilton county directed the certificate to be assigned and the money paid at a future day. Until these acts were performed it could not be final. In *Worsley v. The Earl of Scarborough*, 3 Atk. 361, Chancellor Hardwicke says that "a decree to account is not such a one as puts a conclusion to the matter in question; there is still such a suit as affects people with notice of what is doing." So, in this case, a "conclusion was not put to the matter in dispute;" a writ of *habere facias* was awarded in 1814. By the very terms of the decree it was at the will of either party to defeat its operation. If, upon tender of the assignment, Turner failed to pay the money, King could only proceed by proof of the fact and motion to dismiss the bill. If upon offer of the money, King or Williams refused to assign the certificate, the party must call upon the court to take further order to secure him his rights. The orders made subsequent to September, 1808, are conclusive that the decree was not final. Consequently the defendants purchased pending the suit, and are not protected as purchasers without notice. The original decree is erroneous, and ought to be reversed.

374] \*BACON, for defendant:

The decree of the supreme court of Hamilton county, rendered in September, 1808, was a final decree. All the rights of the parties are fixed and determined by it. No further act is to be done by the court. The parties only are actors. Costs are decreed against one of the parties, which is only done upon a final

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 Botkin, etc. v. Com'rs of Pickaway Co.
 

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decree. Where a decree is merely interlocutory, the cause is ordered to stand over, or be continued for further proceedings. There is no such order in this case.

The proceedings in Ross county were such as are used to enforce a final decree, and such was their object. So the order to issue a *habere facias* in 1814, could only be founded upon the fact that the decree was final.

In the cases cited from 3 Atkins, 361, by the opposite counsel, Lord Hardwicke expressly declares that a final decree is not notice to a purchaser. As the decree in question here was final, there is no ground to disturb the decree upon which this bill is prosecuted.

By the COURT:

We can not doubt but that the decree made in Hamilton county in September, 1808, was a final decree between the parties to it.

The subsequent orders were such as are usually made to give effect to a final decree, and can not lead to a conclusion that any of the original matters litigated in the suit were still open to be decided.

It is well settled that a final decree is not notice to a purchaser. It is not pretended that the purchaser had actual notice.

The bill of review must be dismissed.

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\*BOTKIN, KELLAR, AND MCNEAL v. COMMISSIONERS OF [375  
PICKAWAY COUNTY.

*Judgment—Amendment.*

Final judgment is not amendable at a subsequent term, except in matter of form.

THIS case came before the court upon a writ of *certiorari* to bring up certain proceedings before the common pleas of Pickaway county. An action of debt was brought in the name of the commissioners against Botkin, Kellar, and McNeal, securities in a sheriff's bond. At April term, 1820, judgment was rendered for the plaintiff. Instead of directing execution to issue for the sum due, the judgment was worded to be discharged by the payment of so much money.

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McDougal, etc. v. Holmes, etc.

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At July term, 1824, notice was given to the defendants that a motion would be made to amend the judgment; upon this motion the court of common pleas directed the judgment of April term, 1820, to be amended, by striking out the words "*to be discharged by the payment of,*" and inserting in their place, "*and that execution issue thereon for.*" To reverse this order of amendment, the *certiorari* was sued out, and the decision adjourned to this court by the supreme court of Pickaway county.

By the COURT:

The order of the common pleas of Pickaway county must be reversed. The court of common pleas have no authority to amend a final judgment at a term subsequent to that in which it is rendered, except in mere matter of form. The alteration made in this judgment was in a material and substantial, and not a formal circumstance.

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376] \*STEPHEN McDUGAL AND OTHERS v. ALEXANDER  
HOLMES AND OTHERS.

*Banks—Assignees—Payments.*

THE defendant, Holmes, was president of the Granville Alexandrian Society, which had for some years issued bills, discounted notes, and transacted business as a bank. The complainants, having become borrowers, gave their joint note to Holmes, who received it for account of the society. In October, 1817, judgment was rendered on this note, and upon this judgment several payments were made to the society. In May, 1820, the judgment was assigned for the balance due upon it to the other defendants, who refused to receive the paper of the bank in discharge of it. The bill was prosecuted to compel them to receive it, charging that the assignment was only in trust for the bank, and claiming that if it were not, still the assignees were bound to receive the paper in payment.

The answers denied that the assignment was a trust, and stated that the assignees were the real owners; and upon this state of fact the cause was adjourned here from Licking county for decision.

EWING, for complainants:

We maintain: 1. That on the 5th day of May, 1820, previous to the assignment of the judgment to Granger, the complainants had a right to discharge the judgment by the payment of its amount in notes of the Granville Alexandrian Society; and 2. That this right was not divested by the assignment.

1. Bank notes have for many years past been almost the only circulating medium of our country. They are in law and in fact considered as money; they pass by a devise of all the testator's moneys, and a tender of bank notes in payment of a debt is good, unless specially excepted to by the creditor. . And on principles of equity at least, the banker has no right to object to his own notes where tendered in discharge of a judgment, which was founded on a contract for the loan of the same identical money, He charges his debtor on a count for money lent; the defendant can not \*gainsay the fact, that the bank notes which he bor- [377 rowed were money; much less, then, should the banker who loaned it as money, who pledges his faith that he will redeem it as money, be permitted to question it when tendered to him in discharge of a debt of which it was the subject.

Our statute of the 5th of February, 1819, merely settles what I conceive to have been a clear principle of natural, if not of judicial equity, before its enactment. 17 S. L. 128, 129.

It applies as well to judgments which were rendered before its enactment, and which were at that time unsatisfied as to judgments which should be thereafter recovered. The expression of the act "*in all suits or actions prosecuted*," is as general as language can make it; the passive participle, "*prosecuted*," which is here the operative word, has no reference to time, but depends entirely upon the tense of the auxiliary verb, which may be connected with it, to fix its relation. Standing alone, it applies alike to the past, the present, and the future. Had the legislature intended to confine this proviso to future judgments, the appropriate expression ("*which shall be hereafter prosecuted*") would hardly have escaped them; but if it were intended to extend to all cases which had been, and which should thereafter be prosecuted, they have used appropriate language to convey their meaning. The single word "*prosecuted*," is entirely equivalent to the paraphrase *which shall have been, or which may hereafter be prosecuted*. This construction is strengthened by the general expression in the fifth line of the

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proviso: "The sheriff upon *any execution* in his hands," etc. Here again, had it been the intent of the legislature to limit this proviso, such limitation might have been aptly introduced by adding the words, "issued on any judgment which may hereafter be recovered." But the expressions are general, and the act seems to have been intended to apply to *all cases* where an individual was indebted to a bank, whether the debt were reduced to judgment or not, and that its object was to enable the debtor to discharge such debt in that kind of money which was the subject of the original contract. Nor do I apprehend that this provision of the statute impairs in anywise the validity of private contracts. It merely gives a 378] set-off where it could not otherwise have \*been had without a suit at law, or application in chancery. On the whole we think ourselves safe in the conclusion, that at any time before the assignment to Granger, the judgment debtors had a right to satisfy that judgment by paying its amount in notes on the Granville Bank, and that such notes were a legal tender to the sheriff holding an execution on such judgment.

2. Was this right impaired by the assignment of the judgment?

The transfer of an instrument negotiable in law conveys no greater interest than was vested in the assignor. If the instrument or right be not negotiable, the equity, only, of the assignor is vested in the assignee—and what was the right of the bank by virtue of this judgment? To collect on execution the amount of the judgment in their own notes, which were worth twenty-five cents on the dollar; they could transfer nothing more to their assignee.

Perhaps, by the mode pointed out in the third section of the act, this judgment might have been transferred and free from the privileges claimed under this proviso, but that mode has not been pursued. Indeed, the regulation under which creditors are allowed to attach the credits of the bank, negative, by strong implication, the rights claimed by the defendants under this voluntary assignment. It is specially provided, that the *directors, or those who have been directors, shall be first proceeded against*. Consequently if they have sufficient funds of the bank in their hands, the process would not interfere with the mutual rights of the bank and their other debtors. But to evade the effects of this statute, a board of directors, who were largely indebted to the bank, would doubtless be very ready to assign the debts of others to a creditor who should threaten them with an attachment, that they might

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themselves make payment of their individual debts in their own depreciated paper. Against this and the like abuse, the law was intended to guard.

GODDARD, for the defendants:

The complainants ask the court to exercise the novel jurisdiction of offsetting a simple contract debt due them from the person in whose name the judgment is rendered against a *bona fide* assignee of the judgment, and this \*without any suggestion [379 of the insolvency of the party indebted to them.

Courts of law sometimes set off judgments against each other, in the exercise of an equitable jurisdiction, and in analogy to the statute of set-offs. But the case presented must always show, not only a judgment in favor of each party, but in the same right. Chief Justice De Grey, in the case of *Barker v. Braham*, is particularly guarded in his language: "I am for allowing the present motion, but desire it may be remembered that this is the case of one judgment against another, both in the same right, and must be distinguished from setting off private debts, not in suit, and upon which no judgment has been obtained." Courts of equity have heretofore exercised no other or greater jurisdiction on the subject of set-off than courts of law, with one single exception; and that is in the case of the bankruptcy of a party in England; they set off joint and separate debts, which can not be done at law. 2 Bl. 860.

The complainant's case is not strengthened by the fact that the judgment was rendered in favor of a banking company. The statute on this subject relied upon was intended to compel companies, whose notes had passed as currency, to receive these notes in payment of debts due to themselves. And if we confine the operation of the act to this object, it is a remedial and highly beneficial statute. But extend it as the complainants require—permit a debtor of the bank to pay its *bona fide* creditors, to whom it has assigned the debtor's note or judgment (and it matters not which in equity) in notes of the bank, and the statute is rendered productive of unjust and inconvenient consequences.

Indeed, the legislature intended to guard against this injustice. "In all suits prosecuted by a bank or banker, or those claiming as their assignees or under them, in any way for their use or benefit." And again: "If such bank or banker, their or his assignee, or other



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person, *swing in trust for the use of such bank or banker*, shall refuse," etc., expressly confining the operation of the statute to those assignees who, by covin, should prosecute for the use of the bank, and intentionally saving to *bona fide* creditors of the bank the right to receive assignments of their claims against other 380] \*persons, and to sue them, and collect them in specie. The statute did not intend to prohibit a banking company from paying its debts with the debts due to it, but it intended to prohibit speculation and knavery in the officers and managers of those institutions.

The complainants, perhaps, meet us here by saying that this suit was confessedly prosecuted by Holmes for the use of the bank, and therefore comes directly within the statute. The force of this observation is completely met by a comparison of dates. The judgment was rendered 8th October, 1817, and amended 13th July, 1818. The statute was passed 5th February, 1819, and this section took effect 4th July, 1819. The assignment to Granger was made 5th May, 1820, and the tender of Granville paper the 17th February, 1821. So that the complainants can hardly be said to come within the *letter* of the statute at all; and the equity of the statute surely saves the right of a *bona fide* assignee of a *judgment*, as well as of a note, bill, or bond.

On the whole, the defendants seem to have given the true construction to this statute; while the judgment stood for the use and benefit of the bank, the paper of that bank was received in payment. But when the complaints become negligent, and the bank being pressed for payment by a *bona fide* creditor, they assigned the judgment fairly and without fraud to that creditor, the paper of the bank was no longer received, and could not be without defeating the object of the statute.

For opinion of the court, see the case of *Pancoast v. Ruffin* and others, post.

**\*JONATHAN PANCOAST V. WILLIAM RUFFIN, SHERIFF, AND [381  
THE PRESIDENT, DIRECTORS, AND COMPANY OF  
THE BANK OF THE UNITED STATES.**

*Banks—Assignees—Payments.*

Where a bank has, *bona fide*, parted with all interest in a debt contracted with it, the debtor can not pay the assignee in the paper of the bank.

THIS was a bill in chancery, in which the complainant charged that on the 20th June, 1820, he gave his note to the Bank of Cincinnati, payable in sixty days, upon which note a suit was brought by the bank, and a judgment recovered. That this judgment was afterward assigned to the Bank of the United States. That execution was sued out upon it and placed in the hands of Sheriff Ruffin to be executed. That complainant offered and tendered to said sheriff the amount of the debt and interest in the notes of the Bank of Cincinnati, which, at the request of the Bank of the United States, he refused to receive, and was about to proceed to levy the execution upon the complainant's property, by the sale of which he would be greatly injured. It further stated that the notes of the Bank of Cincinnati were brought into court with the bill, and prayed an injunction, which was allowed.

To the bill the defendants demurred generally, and the decision upon the demurrer was adjourned from the supreme court of Hamilton county to this court.

ESTR, in support of the demurrer:

The defendants insist that the sheriff is not bound to receive the paper in discharge of the execution.

The statutory provision relied upon is in the following words: "Provided always, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, or under them in any way for their use or benefit, the sheriff, upon execution in his hands, in favor of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes of such bank or banker from the defendant in discharge of the judgment; and if such bank or banker, their or his assignee or other persons

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Pancoast v. Ruffin, etc.

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suing in trust for the use of such bank or banker, shall refuse to receive such notes from the sheriff; the sheriff shall not be liable to any proceedings whatever, at the suit or upon the complaint of the bank or banker, their or his assignee as aforesaid."

382] \*It is clear that the privilege of the debtor to pay in the paper of the bank or banker exists in all cases where the suit is brought for the use of the bank or banker. The question is whether it exists in the case of a *bona fide* assignee of a note or judgment.

The following reading of the proviso is submitted as the just and correct one:

In all suits prosecuted by a bank or banker for their own use and benefit, or by persons claiming as their assignees for the use or benefit of the bank or banker, or by persons claiming under such bank or banker in any way for the use or benefit of such bank or banker, the sheriff shall receive the notes of the bank or banker. The words *them* and *their* throughout the proviso, although not grammatically correct, certainly refer, wherever either is used, to bank or banker. All suits brought for *their benefit*, unquestionably means for the benefit of the bank or banker. This is confirmed by the latter clause of the provision: "That such bank or banker, or other persons suing in trust for *the use of such bank or banker*," not for the use of such assignee or assignees. If this construction be correct, it was the intention of the legislature not to extend the privilege of paying in the paper of the bank to any case where the suit was not prosecuted for the use of the bank, whether in the name of the bank itself or by an assignee.

HAMMOND, for the complainant:

The statute under consideration provides for three distinct classes of cases:

1. Where a bank or banker is plaintiff without any regard to the use for which the money is to be recovered.
2. Where the assignee of a bank or banker is plaintiff, no matter for what use the suit is brought.
3. Where any person sues claiming under a bank or banker, in any way for their use or benefit.

The interpretation set up by the defendants confounds all those separate classes of cases, and requires the statute to be read, as if

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every member of the sentence was connected by a conjunction. The reading is this: All suits or actions prosecuted by a bank or banker in any way for their benefit, and in all suits or actions prosecuted by any \*persons claiming as their assignees, for [383 their benefit, and in all suits or actions prosecuted by any persons claiming under them in any way for their benefit. This reading is at variance with the terms used, and the natural construction of the words. It attaches a qualification to the whole, which is unreasonable and absurd.

When the bank sues, and is the plaintiff upon the record, the defendant is not to be put to proof that the suit is for their own benefit. The absolute right is in them, and that is sufficient. If by suggesting a use or benefit in another, the statute could be evaded, and its provisions rendered inoperative, its enactment would have been worse than idle. The legislature have used plain terms—wherever the bank is the plaintiff, there it shall receive its own notes in payment.

This provision might have been evaded by the bank assigning its notes to others, and to prevent this the act attaches the same consequence to a suit prosecuted by an assignee. When an assignee is plaintiff on the record the right is in him absolutely, and if he claim in this character of assignee then the statute also attaches.

The full object of the legislature was not affected by this provision. It was conceived that banks and bankers might contrive some method of suing where neither themselves nor their assignees would be plaintiffs on the record. To meet all such cases, whatever disguise they might assume, the third provision is made, and the law is extended to all suits prosecuted by persons claiming under banks or bankers in any way for their benefit. Every possible form of suing is thus provided for. And to every possible form of suing it is contended that the legislature meant to extend the law.

The circumstances of the country, upon which this law was intended to operate, must be taken into consideration in determining its true meaning. Banks and bankers had been for some time driving a trade in credits. They exchanged their own notes, containing a promise to pay money on demand, for the notes of others promising to pay money at a day certain. At the time of exchange, the bank or banker did not intend to pay money for his

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note on demand. Nor was it expected that the other party would 384] take up \*his note when due, by the payment of money. The notes of banks and bankers were scattered over the country, and in consequence of disregarding the engagement on their face, to pay them when demanded, they greatly depreciated. The individual notes given for them were retained by the bankers, and preserved their nominal value. In this state of things to permit the banker to enforce payment, and reject or refuse to receive his own notes, would be holding out an inducement to him to increase the discredit of his paper, that he might purchase it up for a trifle, and make a clear speculation of the difference between the amount at which he issued it and the amount at which he redeemed it. It was just that he should receive his own paper in payment, and it was the policy of the legislature to make these floating credits liquidate each other. This could only be done by closing the door against all contrivances to convert the one into money, and leave the other afloat. Were the law ambiguous, it would be the duty of the court to favor the interpretation that would effect its object; but when the most obvious sense of the terms requires that they should be thus understood, it would violate all sound rules of construction to seek for a different meaning.

A strange notion has of late possessed some very able jurists, that the remedy enters into, and is of the essence of the contract, so that any legislative variation of the remedy which tends to delay the party plaintiff from enforcing his judgment, impairs the obligation of the contract, and is, therefore, in our government, inoperative. It is not necessary here to combat this fallacy. The act which we seek to enforce took effect on the 1st June, 1820, and the bill charges that the contract was made on the 20th of that month. It is, therefore, the law that provided the remedy when the contract was made, and the case can not be affected by the principle referred to.

By the Court:

This case, and that of McDougal and others v. Holmes and others, depend upon the same principle—the just construction of the “act to regulate judicial proceedings where banks and bankers are parties,” etc.

385] \*The first seven sections of the act are employed in making provisions to enable those who are creditors of banks or bankers

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to secure their claim. For this purpose such creditors are authorized to attach the debts due to the bank or banker in the hands of their debtors, and thus secure the credits of the institution for the liquidation of its debts.

The eighth section relates to proceedings between the banks and their debtors. Its first enactment gives to the bank or banker a more simple method of suing for its debts secured by indorsement; the proviso or latter clause of the section secures to the debtors of the bank or banker, in *certain cases*, the privilege of paying the debts they owe to a bank or banker in the bank paper issued by the institution with which the debt was contracted. This privilege extends only to a case where the suit is prosecuted against the debtor, in *any way for the use and benefit of the bank or banker*. It can not consistently with the other parts of the statute be extended further; for if the construction contended for by the complainants were adopted, all the beneficial effects of the previous sections would be defeated by the eighth. The creditor of the bank, after he had been at the trouble and expense of prosecuting his attachment, and obtaining judgment against the debtor to the bank, and when he hopes that he is about to receive the fruits of his trouble and expense, is paid off with the paper of the same bank, and finds himself, after all his pains and losses, just where he started.

Statutes should be so construed as to give effect to the intention of the legislature, and, if possible, render every section and clause effectually operative. In this act the intention of the legislature is manifest; it is to aid both the creditors and debtors to banks.

It can not be rationally supposed that it was intended to hold out encouragement to claimants to prosecute for their claims under the provisions of this act, and then mock them and disappoint their just expectations. Such trifling ought not, and can not, be imputed to the legislature.

The terms in the eighth section to which the parties give a different and directly opposite construction are these: "*That in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees, or under them in any way for their use and benefit.*" The complainants insist that the disjunctive *\*conjunction or* [386 separates the sentence so as to form three distinct classes of cases, in which the rights of paying in the paper of the bank is secured;

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so that an assignee is obliged to receive the paper although the bank has no interest in the debt assigned.

This construction is founded upon a mere grammatical criticism, which is never received to change or control the intention of the legislature, where that intention is otherwise clearly expressed. Something may depend upon the punctuation in the statute book, which may be incorrect, and ought never to vary the true sense. Leave out the comma after the word "*assignees*," and the plain construction is, that the after words "*for their use or benefit*," apply to each preceeding clause of the sentence. This is believed to be the correct interpretation, either with, or without the comma, and perfectly consistent with the reason, the justice, and the spirit of the act. When, therefore, the debt has been *bona fide* assigned, and the bank has no interest left in it, the assignee is not bound to receive the notes of the bank in discharge of it.

Bills dismissed with costs.

Judge BURNET dissented.

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JOHN INNES v. REUBEN AGNEW.

*Seisin—Warranty.*

The act concerning actions for covenants real does not extend to a deed containing a covenant of seisin as well as of warranty.

A declaration on covenant of warranty must aver eviction.

THIS was a writ of error to the common pleas of Muskingum county, in an action of covenant, in which judgment had been rendered for the plaintiff, the now defendant in error.

The declaration set forth a deed for the conveyance of a lot of ground, containing covenants of seisin of general warranty, and against incumbrances. It assigned as breaches that the grantor was not seized. That he did not warrant and defend the premises against all claims, but that on the contrary the legal title, at the date of the deed, was in one Pierce. That the premises were in-  
387] cumbered with a mortgage, \*and that the mortgagee had prosecuted a *scire facias*, obtained a judgment, and sued out execution, upon which the premises were sold.

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To the first breach the defendant pleaded that he was seized in fee, upon which issue was joined, and to the three last breaches he demurred.

The cause was submitted to the court both as to fact and law. They found the issue on the first plea in favor of the defendant, and on the other breaches gave judgment on the demurrers for the plaintiff and assessed his damages, and entered final judgment.

Upon the writ of error several errors were assigned and argued by counsel. But as the court decided upon one point only, it is not necessary to notice any other in the report.

It was assigned for error that the second breach does not aver an eviction, and that in this particular the declaration was defective.

DOWNER, for plaintiff in error:

In an action upon a covenant of general warranty it is indispensably necessary to allege and prove that the plaintiff has been evicted by paramount title. 2 Johns. 1, 4; 7 Johns. 254; 11 Johns. 122.

The statute of Ohio declaring the law in certain cases of covenant real does not apply to this case. It only applies to cases where the deed contains a covenant of warranty, and no covenant of seizin. The common law principle that the plaintiffs could not recover upon a covenant of warranty, while he retained possession, even where the title was acknowledged to be defective, was an evil, to remedy which the statute was enacted. But this evil did not exist where the deed contained also a covenant of seizin, upon which the grantee could immediately pursue his remedy.

The words of the first section of the act, "*all deeds of bargain and sale for the conveyance of lands containing the common covenants of general warranty*," taken as they stand and with the context, must mean all such deeds as contain those covenants *only*, and not that of seizin, otherwise the language of the last part of the section is nonsense. It goes on to provide that "the grantee shall in such case \*maintain his action upon such covenant of gen- [388  
eral warranty in the same manner that he might have done had such deed contained *also* a covenant of seizin. These terms ex-



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clude from the operation of the statute a deed containing a covenant of seizin, as well as a covenant of warranty—and show clearly that it was not the intention of the legislature to give the new remedy where the old one could be resorted to.

GODDARD, for defendant in error:

A first impression may seem to favor the construction of our statute set up by the plaintiff in error. But when the whole statute is considered, and the effect of that construction in limiting the remedy contemplated by the legislature, it must be held inadmissible.

The statute is a declaratory one. It recites that doubts are entertained whether an action can be sustained upon the common covenant of general warranty, before the grantee is evicted, and that it is essential to right and justice that such doubts be removed, and its enactments are founded upon those recitals. What were the doubts to be removed? Not whether an action could be sustained upon a covenant of warranty, without eviction, where the deed contained only a covenant of warranty. But a doubt applicable to all covenants of warranty, whether standing alone in the deed or united with others. The fact that the deed contained a covenant of seizin did not remove the doubt, as to the state of facts necessary to sustain an action on the covenant of warranty.

The covenant of seizin and a covenant of warranty are not synonymous covenants. A covenant of general warranty is the highest and most beneficial covenant to the grantee. It protects him when a covenant of seizin would not. The grantee may be seized in fee at the time of the grant, and yet his estate need not be an indefeasible one. He might lose the land, when the covenant of seizin would afford him no relief. But the covenant of warranty is always a safe protection. It extends to incumbrances and defeasances, and it was the intention of the legislature to authorize it to be brought, without eviction, in all cases where it would lie after eviction, whether the same deed contained a covenant of seizin or not. The court should rather strive to give effect to the intention of the legislature than to a strict grammatical meaning of words.

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By the COURT:

The usual or common covenant of seizin stipulated that the grantor in the deed was seized of a good and sufficient title, and had right and authority to sell and convey. This covenant was in the present tense, and if the fact was contrary to the stipulation, the agreement was violated as soon as made, and a right of action arose immediately. The common covenant of general warranty is in the future, that the grantor will warrant and defend the title. Courts of justice doubted whether the grantor could be called upon to perform this covenant, while the grantee was permitted to hold possession under the grant. The evil of this principle was, that if the title was defective, and the person who had better title chose to lie still, the grantee could do nothing for his future protection and security. To remedy this mischief the statute was enacted. The mischief did not exist where the deed contained a covenant of seizin in the usual form. If the grantee covenanted that his title was indefeasible, when it was not, or that he had right to sell when he had not, or that he was seized of a good title, when his title was defective, the grantee could have immediate remedy. If his deed contained those covenants which usually accompanied the covenants of seizin, as part of it, his case required no statutory provision. And it would be one to which the terms of the statute do not extend. It is neither within the mischief, nor the letter. And it would be unwarrantable to include it.

The second breach is not well assigned upon common law principles. The court consider the law to be settled, that the breach ought to allege an eviction under a superior or better title to maintain an action upon the common covenant of general warranty. And it is also their opinion that the case is not within the provisions of the statute. The damages assessed are upon the three last counts; the judgment must, therefore, be reversed, and judgment given for the defendant upon the demurrer to the second breach.

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Lessee of Hatch v. Barr.

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**390] \*LESSEE OF JERUSHA HATCH v. JOHN T. BARR.***Conveyance by Corporation.*

THIS was an action of ejectment, tried in the supreme court of Hamilton county. The case was as follows:

At June term of the supreme court in Hamilton county, in the year 1821, a judgment was recovered by the treasurer of state against the president and directors of the Miami Exporting Company for \$9,618.27. Upon this judgment execution issued, and was levied upon the property in dispute, the bank house in Cincinnati; and the law not requiring property seized upon execution for a debt to the state to be valued, the plaintiff bid off the house for the sum of \$250, at sheriff's sale. A deed of conveyance by the sheriff to the plaintiff was duly executed, and upon these proceedings and this deed the plaintiff rested the cause.

The defendant produced a paper purporting to be a conveyance of the property in question to him, by the president and directors of the Miami Exporting Company, dated the 8th day of June, 1821. In this deed the president and directors of the Miami Exporting Company were named as grantors. The attesting clause was as follows: "In witness whereof, I, Oliver M. Spencer, President of the said Miami Exporting Company, have hereto set my hand and seal," etc. "Oliver M. Spencer, President of the Miami Exporting Company," written opposite a seal of wafer and paper, with no distinct impression.

In connection with this deed the defendant produced a resolution of the board of directors of the Miami Exporting Company, made on the same 8th day of June, 1821, in the following words:

"Resolved, That the president of this institution be authorized and directed to sell and convey to John T. Barr, of Baltimore, by deed in fee simple, with covenant of general warranty, the brick house and lot which was conveyed to the president and directors of the Miami Exporting Company by Martin Baum, by deed bearing date the 26th day of March, 1816. Also, one hundred and thirty-eight acres and one-tenth of an acre, in the fourth section

**391]** of the third \*township, of the second fractional range in

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the county of Hamilton and State of Ohio, being the same land that was conveyed to said company by the president and directors of the Bank of Cincinnati, by deed bearing date the 8th day of February, 1821. Also, the house and lot, late the property of David Brown, lying on Fifth street, in the town of Cincinnati, and being a part of lot No. 293, and which was conveyed to said Miami Exporting Company, by R. Ayres, sheriff of said county, by deed bearing date 23d day of June, 1820, for the consideration of the sum of ten thousand seven hundred and sixty dollars, in part discharge of the debt due from this institution to the said John T. Barr.

*“Resolved, That the said president be authorized to execute to the said John T. Barr a bond, with a condition that if the said John T. Barr shall at any time within the term of one year reconvey to this institution the same property in the same manner, the conveyance shall be received, and the sum of ten thousand seven hundred and sixty dollars placed to the credit of the said John T. Barr on the books of this institution.”*

The defendant further offered to prove, in connection with the deed and resolution above stated, that the sum of ten thousand seven hundred and sixty dollars was paid to the bank at the time of making the deed, by a check in favor of the bank, drawn by the agent of John T. Barr, and charged to his account on the books, which fact of payment so made was admitted by the counsel for the plaintiff.

The defendant further offered proof that the Miami Exporting Company had never, by any formal resolution, adopted a seal; but that the seal impressed upon the paper in question was procured by the president, and had been used as the seal of the institution, which fact was also admitted by the plaintiff's counsel.

The plaintiff objected to the paper purporting to be a deed being given in evidence to the jury, because not executed by the president and directors of the company and under the seal of the corporation, and therefore not operative as a conveyance. The court decided that the deed could not be given in evidence to the jury, and the plaintiff had a verdict.

\*The defendant moved for a new trial on the ground that [392 the court erred in not permitting the deed to go the jury. And at his request the decision of this motion was adjourned to Columbus.

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WADE and HAYWARD, in support of the motion :

It is believed that two questions only are involved in the case :

1. Whether Oliver M. Spencer, as president of the Miami Exporting Company, was fully authorized by the resolution passed the 8th of June, 1821, to make a good and sufficient conveyance of the property in dispute to the defendant? And :

2. Whether he has made the conveyance in conformity with the power with which he was invested ?

*First.* That the resolution of the board of directors contains all the essential requisites of a special power of attorney to convey real estate will not be denied ; and that Mr. Spencer, as president of the institution, was fully authorized to make the conveyance purporting to have been made in the deed, can not be doubted. As between the bank and the defendant there does not appear to have been any dispute, everything was done in good faith, and the resolution was adopted *unanimously*.

*Second.* It is admitted, as a general rule of law, that the attorney must execute his power in the name of his principal, and not in his own name ; but it is respectfully contended that the present case does not come within that rule and must not be governed by it. Here the Miami Exporting Company had made an agreement with the defendant for the sale of the property in question, and it became necessary for the corporation to make good and sufficient deed of conveyance for the same. This could only be done by some one of its officers, or some other person specially appointed, and authorized for that purpose. The *president* of the institution was authorized to execute the deed, and *not* Oliver M. Spencer in his *private capacity*. It has been done so. In this he did not act as the *attorney* for the bank, but as the *president of the corporation*. And in that capacity it was contemplated he would act by the general tenor of the resolution. The bank was to convey, and the *president* of the bank was to *execute* the deed of conveyance. And 393] how, it is confidently \*asked, does the instrument vary from the spirit and meaning of the resolution? It is in every particular, in both form and substance, a deed from the Miami Exporting Company to the defendant, with the exception of the clause of execution, and *that*, it is contended, is defective only in *form*, which is not such a defect as to render the instrument void. There is no particular form of words required in the execution of a deed under a power of attorney, and it matters not what form of words is

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used, if the authority is sufficient to warrant the act done. 2 East, 142; 4 Hen. & Mun. 184. The objection to the execution of this instrument is strictly *technical*, and is believed to be more specious than solid. Had the form been: "The president and directors of the Miami Exporting Company, by Oliver M. Spencer, their president, etc.," no objections would have been raised, for the seal used is the only seal ever used by the company. These additional words are words of *form* only, and it will not be denied that Mr. Spencer had full and lawful power to have used them in the present case, why, then, should an instrument entered into, in good faith, for a lawful and sufficient consideration, and containing every essential matter of *substance*, be deemed invalid and of no effect? Could the bank come into court, under any circumstances, and take advantage of the form of the execution and have this instrument adjudged *void*? It is believed it could not; their own resolution would meet them at the threshold, and bar their objection. And besides, *technical* objections are never suffered to influence a legal decision, where their tendency is manifest injustice, and where they can not be sustained without a flagrant violation of the *equity* of the case.

HAMMOND, for the plaintiff:

The resolution of the board of directors is not a good power authorizing the president of the institution to convey. A power of attorney to convey real estate must be executed with all the formalities of an actual conveyance. The resolution may be good authority for the president to sell and convey the lot for the company and in their right, but it can not operate so as to sustain a conveyance made by him as president.

\*The paper offered in evidence purported to be a deed in [394 which the company were grantors, but it was not executed by them. To effect this, the attestation clause of the deed should be in their name, and under their common seal. It is in the name of the president under his own seal. The grantors have not executed the writing. They can execute it in but one manner: as a corporation under their corporate seal. If the president executed it as their attorney, the same form of attestation must be used. As president, and in that character, he can not convey the real estate of the company. They can not convey without using a common seal. They might as well adopt the seal used as any

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 Lessee of Bond v. Swearingen.
 

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other, but it must be adopted by resolution. 1 Swift, 71; 2 Conn. 579. And it must be named in the attestation clause of the deed.

By the COURT:

The paper offered in evidence purports to be a conveyance from the president and directors of the Miami Exporting Company as grantors. It is executed by O. M. Spencer as president, in his own name and under his own seal as president. The grantors named in the deed do not execute it. The person who executed it had no interest in the subject conveyed, and is not named as grantor in the deed. It is, therefore, no conveyance. The motion for a new trial is overruled, and judgment entered on the verdict.

Judge BURNET, being a stockholder in the Miami Exporting Company, did not sit in this case.

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## \*LESSEE OF BOND v. SWEARINGEN.

*Conveyance for Gaming Consideration—Attachment—Sale by Auditors—Ancestor and Heir—Estoppel.*

Estate forfeited to heirs by conveyance for gambling debt may be taken by heirs, subject to the debts of the grantor.

Whether the grantor in a voluntary deed be indebted at the time of the grant is a fact to be found by the jury.

If lands are located and surveyed by an ancestor, and patented to heirs, they take by descent.

Heirs taking by descent are estopped by the deed of their ancestor.

THIS was an action of ejectment, and came before the court upon a motion for a new trial, made by the plaintiff, and reserved in the county of Ross. As the opinion and decision of the court is confined altogether to the title of the defendant, so much only of the statement of the case, and the argument of the counsel, as relate to that title, are presented.

The suit was brought to recover a lot in the town of Chilli-cothe. The tract of land, including the lot in question, was entered by N. Massie on the 27th of June, 1795, as in his own right—

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Lessee of Bond v. Swearingen.

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was surveyed on the 24th of December, 1796, and the plat and certificate of survey recorded in the surveyor's office, June 9, 1797.

On the 21st day of September, 1797, Nathaniel Massie conveyed the lot in question to Basil Abrams, by deed of general warranty.

Basil Abrams, on the 21st of May, 1801, conveyed the lot in question to John S. Wills, by deed of general warranty, for a consideration expressed of \$1,200. The real consideration was, as proved and admitted at the trial, that Wills won the lot of Abrams at a game of billiards.

Soon after the execution of this deed Basil Abrams left the country to which he never returned. On the 15th of February, 1802, an attachment against B. Abrams, as an absconding debtor, was sued out of the common pleas of Ross county, and levied upon the lot in question, upon which such proceedings were had that the lot was sold by auditors, and regularly conveyed, under which conveyance the defendant claimed.

The debts of Basil Abrams, as found and certified by the auditors, amounted to \$1,999.22.

In the year 1811, Nathaniel Massie deceased, leaving several children his heirs at law. After his death it was discovered that no patent had issued for the tract of land in which the lot is included, and a patent was obtained to his heirs, dated 31st December, 1814.

\*Upon the trial of the cause before the supreme court of [396 Ross county, the jury found a verdict for the defendant, and a motion was made for a new trial, upon the ground that the verdict was against law. The decision of the motion rested altogether on the validity of the defendant's title.

LEONARD, for the plaintiff :

The defendant's title rests upon the proceedings in attachment, and they can avail nothing unless the lot was the property of Basil Abrams, liable to his debts at the time the attachment issued.

The deed from Abrams to Wills, made on the 21st of May, 1801, was for a gambling consideration. The law of the territory, then in force, provided, that any conveyance made to satisfy or secure money, or other thing, won of the vendor, should inure to the use of the heir of the vendor, and should vest the whole estate and



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interest of such a person in the lands sold, to all intents and purposes, in the heir of the vendor, as if such vendor had died intestate. By force of this law, the deed to Wills operated to divest Basil Abrams of title, and to vest that title in Eleanor Abrams, his heir.

But it is asserted that the heir took the estate subject to the debts of Basil Abrams, and, therefore, it was liable to be taken in attachment for his debt. Upon what principle is this doctrine founded? There is no provision saving the rights of creditors, and can the court interpolate such a provision?

In England there are many cases where the commission of crimes operated a forfeiture of estates. Such laws, too, have prevailed in some of the states of this Union; but in none of these cases does the fact of the felon being in debt overreach the forfeiture for the protection of the creditor; at least I have been able to find no case where a creditor has set up a right to pursue an estate so forfeited.

If, however, the heir in this case took the estate subject to the debts of Basil Abrams, are the proceedings in attachment evidence against the heir upon that point?

The heir, whose rights are to be affected, was no party to the proceedings; they were *res inter alios actæ*; he can only be affected by a decision in a case where he was a party. He had a right to a day in court to contest the justice of the debts, and if charged upon the estate in his hands, he should have an opportunity to save his estate by paying the debts.

Evidence of the indebtedness of Abrams was adduced at the trial, but could the right of the heir in whom the law vested the estate be thus collaterally assailed? The estate having vested in him might be charged with the debts by legal process; but until so charged the title remained where the law cast it. The fact of Abrams being in debt would not divest the estate out of the heir, unless it was charged with the debt in a legal manner, and the title transferred legally in discharge of the debt. The parol evidence given, that Abrams was at the time indebted, could not affect the title.

There are two exceptions to the auditor's deed, under which the defendant claims. There should have been proof that the lot would not rent for sufficient to pay the debt in seven years; and

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also proof that legal notice of the time and place of sale was given. 3 Territorial Laws, 15, 16; 1 Ohio, 27.

It is alleged that the notice at this distant day should be presumed. It is replied that the heir at law, upon whom the estate was cast, was a minor at the time the estate was vested, and has but a short time since attained her majority.

But long since all these proceedings, the grant creating the legal title to the tract of land, including this lot, issued to the heirs of Nathaniel Massie. By the grant the legal title vested in the patentees, from whom the defendant deduces no title. The legal title can not be affected by proceedings had before it was in existence.

It is understood that the defendant insists that the title vested in Massie's heirs, by the patent, inures for the benefit of those claiming under deed made by Massie so as to vest, in all such, an operative legal title. This can not be the case: because the legal title comes to the heirs of Massie, by purchase, and not by descent. The term *heirs* used in the patent, is merely descriptive; it can upon no principle be taken as a term of limitation.

\*It has justly been remarked that "words of purchase," [398 and "words of limitation," have been good clients in Westminster Hall; and there is no doubt that if once introduced into our courts, they will be good clients here. The line that divides them is described by

"Hooks, angles, crooks, and involutions wild,"

and the cases in which they have been agitated are truly of a "multiplicity and incongruity" most appalling. But there is no case, in which, where a title emanates directly, and originally from the sovereign to the heir, that the grantee has been considered as in by descent.

The question whether the heir shall take by *descent* or by *purchase* only arises when an estate is created in the ancestor and limited to the heir by the *same conveyance*. For even in Shelly's case it is admitted that if an estate be conveyed to the ancestor for life, by one conveyance, and the remainder be conveyed to the heir, by a separate conveyance, the heir takes as purchaser. And, in the principal case, the right of Edward Shelly and his heirs male was derived from the same common recovery. So in Wood's case, stated by the defendant's counsel in Shelly's case, the covenant, upon a certain event, to stand seized of lands to the use of the covenantor and his heirs, was the foundation of the title of *both*. The

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same conveyance created the estate of ancestor and heir—and it could make no difference, as the estate was in its nature contingent, that the ancestor died before the event happened upon which it vested in possession. Its original character remained the same as if that event had happened in the lifetime of the covenantee, or ancestor. In the case stated of an exchange of land, the exchange is supposed to be made by conveyance, containing words of limitation to heirs general or special; indeed the whole doctrine, perplexed and vexatious as it certainly is, has no application to any case other than where an estate is derived to *ancestor* and *heir* from the *same conveyance*. That is not the case here. However, the estate of the heirs of Massie derived to them as heirs under the grant from the government, may be predicated upon the original interest of their ancestor, yet they do not take the legal title by descent, but by purchase.

The rights of purchasers under Massie, or his creditors, are in no 399] other way affected by the doctrine we maintain, \*than that their rights must be secured by a court of equity, instead of a court of law.

Where the ancestor has paid the consideration, and the heir receives the conveyance, although he must necessarily take as a purchaser, because the estate is not so derived that he can take by descent, yet, in equity, the estate is assets for the payment of debts; and if the ancestor had made a contract to sell, the heir taking the title would, in equity, be deemed a trustee for the purchaser. It might be more convenient, in such case, to adjudge the heir in by descent, so that where the ancestor had conveyed, the title might inure. But this would be establishing a new doctrine, which, to say the least, might introduce as many mischiefs as it would remedy.

If, then, the heirs of Massie took the legal title by purchase and not by descent, the defendant's title is incomplete.

BRUSH and FITZGERALD, for the defendant:

The deed from Basil Abrams to Wills was a voluntary conveyance, made without any consideration to sustain it. If by operation of law it divested Abrams of his estate, and instead of carrying that estate to the grantee, transferred it to the heir of Abrams, this effect did not change its character as a voluntary conveyance,

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and therefore as against the creditors of Abrams it was void, under the statute of Elizabeth then in force in this country.

But if it were not void against creditors as a voluntary deed, yet the heir who took the estate must take it subject to the debts of the grantor then due. For had the estate vested in consequence of the death of the ancestor, the heir would have taken subject to those debts. And the law, which casts the estate upon the heir, casts it upon him in terms, for *every intent and purpose* the same as if the grantor had died intestate.

There was no necessity to make the heir party to the proceedings against Basil Abrams. The attachment against him reached every interest which he had held, that was liable to the payment of his debt. He was *in esse* and competent to appear and defend the suit. If he did not do so, \*the heir is bound by the judgment against him, and is estopped to deny its effect. 1 Salk. 276. [400

It is objected that the sale by the auditors is invalid, because it does not appear that the lot would not rent for sufficient to pay the debts in seven years. An inquest for this purpose was unnecessary; the property was valued under the attachment law, and the whole valuation was considerably less than the debt.

The case is not like that of Patrick, Lessee, v. Osterout, 1 Ohio, 27, quoted by the other side. Here was a valuation or appraisement, and it appears in the record. The attachment law only requires that the court shall be satisfied that the property will not rent, and of this the valuation left no doubt. The order for effecting the sale is conclusive upon that point.

With respect to the proof of notice, that is not a fact which can affect the sale. In the case of Wheaton v. Sexton, 4 Wheat. 506, the court say: "The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether he makes a correct return, or any return at all, to the writ is immaterial to the purchaser, provided the writ was duly issued and the levy made before the return."

DOUGLAS, on the same side:

The defendant being fairly and fully invested with all the right conveyed by N. Massie to Basil Abrams, is possessed of the legal estate, in virtue of the grant to Massie's heirs, which inures to his benefit under the covenant of warranty in the deed from Massie to

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Abrams. The opinion of Judge Swan, in the case of Tabb and Massie's heirs, is full to this point, and though not an authority in this court, is entitled to weight and consideration, both for argument and research.

The same decision was made, on the same point, in the case of Johnson v. Miller's and Massie's heirs, in the United States Circuit Court, after keeping the case under advisement for twelve months.

Independent of authority, there would seem to be one plain practical principle which must test the question. If, in a suit 401] against them upon a bond of their ancestor, in \*which they were named, the heirs of Massie should plead *rein per descent*, and a replication of assets, setting out the title of Massie, and of the heirs in these lands, would this replication be bad upon demurrer? If such replication would be bad, the heirs would take the estate discharged of the ancestor's debts; if good, their actual interest in the land descends from him, and his acts must be as operative upon them, as they could have been upon himself.

It is a well settled rule that a man can not, "either by conveyance at the common law, or by limitation of uses or devise, make his right heir a purchaser." Vent. 372. And in all cases where an estate vests in the ancestor, the heir takes the same estate by descent. Blackstone lays it down that if the ancestor "*die before entry*, still his heir shall take by descent, not by purchase; *for where the heir takes anything that might have vested in the ancestor, he takes by descent, and not by purchase.*" 2 Com. 242. In this case the right originated in the ancestor, and the legal title might have vested in him. For the same consideration it is vested in the heir, who must be considered as holding by descent.

It is generally agreed that the short amount of the rule in Shelly's case is this, "that no man shall raise in another an estate of inheritance, and at the same time make the *heirs* of that person *purchasers*." A rule of which Mr. Justice Blackstone remarked, "that no court of justice in the kingdom had the power, or (he trusted) the inclination to disturb."

The question of *descent or purchase in Shelly's case* arose under a common recovery, in which Edward Shelly, the recoverer, deceased after judgment, but before the emanation of the writ of seizin. Richard Shelly, to whom the use was limited by the recovery, as heir male to the recoverer, entered and although no estate ever vested in Edward Shelly under the recovery, yet it was

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adjudged that Richard took by descent from his ancestor Edward, and not by purchase.

As the recovery in this case was incomplete, and constituted but an inchoative title until the execution of the writ of seizin, it is supposed to be strikingly analogous to this case, in which the inchoative right was in the ancestor, and perfected in the heir after his death by the grant. The \*principle being, that where [402] the heir takes that which his ancestor, if alive, would have taken, he is in by descent. This is recognized as the correct doctrine in Jenkins, 249; 14 Vin. 269; Sir T. Jones, 59; Coke Lit. 229; 8 Mod. 23; 3 Bibb, 2; 12 Johns. 318; 14 Johns. 405.

The heirs of Massie, taking by descent from him under the grant, are estopped from disputing the title in their ancestor, hence their title inures to the benefit of his grantee. *Barr v. Gratz*, 4 Wheat. 222; 4 Bibb, 536; 1 Salk. 276; Coke Lit. 352, a.

Opinion of the court, by Judge SHERMAN:

The result of the motion for a new trial in this cause must depend upon the question, which of the parties has a valid legal title to the premises in question. The defendant has obtained a verdict, and that verdict ought not to be set aside if his title papers, connected with the evidence in the cause, show a subsisting legal title in him. In order to determine this question, it is necessary to ascertain the effect of the deed from Basil Abrams to John S. Wills, of May 1, 1801; the proceedings had under the attachment, at the suit of Reuben Abrams against B. Abrams, and the grant by the government of a tract of land, including the premises in controversy, to the heirs of Nathaniel Massie, deceased.

The deed from B. Abrams to J. S. Wills, of the lot in question, dated May 1, 1801, is admitted to have been executed upon a gambling consideration.

By the act of the territorial government, then in force, entitled "a law to suppress gaming," it is provided, "that all conveyances, etc., made for a gambling consideration, shall inure to the use of the heir of the bargainer, etc., and vest the whole estate, and all the interest of such person in the land so bargained, to all intents and purposes, in the heir of the bargainer, the same as if the bargainer had died intestate."

It is believed that this act of the territorial government has never received a construction by our courts.

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It is contended by the plaintiff's counsel, that the lot in question, by virtue of this act, became forfeited to the heirs of B. Abrams 403] upon the execution of the deed from him to \*Wills, and that they took the same discharged from all liability for his debts.

In the opinion of the court this construction is neither warranted by the words nor intent of the law. The legislature can, without doubt, attach forfeitures to the commission of offenses, and such forfeitures may be general, including all the property of the offender, subject only to actual liens, or limited in amount or kind, and restricted by provisions for the benefit of creditors and others. Whatever may be the nature or kind of forfeiture, it is never carried by construction beyond the clear expression of the statute creating it.

When a deed is founded on a gambling consideration, the statute vests in the heir of the bargainer all his interests to all intents and purposes, the same as if such bargainer had died intestate; the law considers the bargainer *per hoc vice* as dead; the heir takes the same as if the ancestor, instead of executing the conveyance, had that moment died. The estate does not become forfeited, but the grant is to inure to the benefit of the heir of grantor, and he takes the lands mentioned in the conveyance by virtue of the statute, the same as he would had they descended to him by the death of the ancestor. He takes as heir, and not as the grantee of government of a forfeited estate. The property vesting in him as heir, he necessarily takes with all the responsibilities and liabilities attached to that relation. The expression of the statute that the interest of the bargainer shall vest "in the heir the same as if the bargainer had died intestate," would be rendered vain and useless by any other construction than that the land so coming to the heir shall in his hands be subject and liable to all claims that it would had it descended to him by the death of the bargainer.

The construction contended for by the plaintiffs would work manifest injustice in many cases. An individual who had obtained credit, and become indebted, could not well devise a more ready and easy way of protecting his property from his creditors than by conveying the same for a gambling consideration, if such conveyance was to inure to the use of his heirs, the natural objects of his care and bounty, to the exclusion of the claims of his creditor. 404] The expression \*of a law should be clear, and the intent manifest, before a court could be justified in giving it a construction

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that would obviously protect fraud and deprive creditors of their just claims upon the property of the debtor, and such would be the effect of this law, if the construction contended for by the plaintiffs should prevail. The heirs of B. Abrams would hold this estate as forfeited to them by the act of their ancestor, free from any liability to the claims of his creditors. We are satisfied such was not the intent of the territorial government in adopting this law; but that it was intended to protect the improvident from gambling away their property to the injury of their creditors and heirs, and that to effect this purpose the statute prevents all lands conveyed for a gambling consideration from vesting in the grantee named in the deed, but makes such deed inure to the use of the heir of the grantor, so that he shall take the lands subject to the same liabilities he would, had he inherited them in the usual course of descent.

It will be perceived upon the perusal of this statute that it nowhere expressly prohibits gaming, or subjects persons guilty thereof to any species of judicial prosecution, and it is difficult to perceive how a forfeiture of lands should result from the doing of an act neither prohibited nor punished.

At the time Basil Abrams executed the deed to J. S. Wills for a gambling consideration, the real, as well as personal estate of the debtor, was subject to the payment of his debts. If he was living, his real estate, if it would not extend in seven years for sufficient to satisfy the judgments against him, might be levied on, and sold. And in case of his dying intestate, the whole real estate of which he died seized, and which of course descended to his heirs, might, if necessary, be sold by the order of the court of probate for the payment of debts, or the judgment creditor might enforce a sale.

The heir took the estate with this legal liability or incumbrance attached thereto, and had B. Abrams died on the 1st May, 1801, the day of the date of the deed to J. S. Willis, without executing that deed, the lot now in question would have descended to Eleanor, his heir, subject to the payment of his just debts. The territorial law gave to the heir of a grantor for a gambling consideration no greater interest in the lands conveyed than if the same lands had  
405] come to the heir by descent. Their lands are therefore subject to the payment of the debts of Basil Abrams.

If the deed from B. Abrams to Wills, inuring as it does by virtue of the statute to the benefit of his heirs, be considered as a voluntary conveyance, without valuable consideration from him to



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them, the effect is the same, for by the statute of Elizabeth, then in force in the territory, as well as by the principles of the common law, such voluntary conveyance is void as against creditors.

It is said that admitting this property liable to payment of the debts contracted by B. Abrams before the conveyance to Wills, there was not evidence to warrant the jury in finding him so indebted.

This was a question of fact submitted by the court to the jury for their determination, and the evidence fully justified the finding. It appeared that immediately after executing the deed to J. S. Wills, B. Abrams shut himself up and kept concealed, until a few days thereafter he left the country. He had, therefore, little or no opportunity of contracting debts, and after divesting himself of his property it is not presumable he would obtain extensive credit; and yet the auditors appointed under the attachment to adjust and examine the several claims against his estate, report a list of his creditors, to whom he was severally indebted in sums from \$1.91½ to \$669.50, amounting in the whole to the sum of \$1,996.22. In addition to this there was direct evidence of his indebtedness at the time of his executing the deed.

If the matter were even doubtful, it was the province of the jury to weigh the testimony and determine the fact, and the court ought not to disturb the verdict because the fact was not proved beyond doubt. It is sufficient that there was testimony going to establish the fact, especially in the absence of all proof to the contrary and after the lapse of twenty years.

But it is said that admitting the sale by the auditors under the attachment transferred to the purchaser all the interest that B. Abrams ever had in the lot in controversy, yet as the deed from Massie to Abrams was executed before Massie had obtained a grant from the United States, although subsequent to his entry and survey, 406] Abrams acquired but \*an equitable interest, and the patent, after the death of Massie, having issued to his heirs, they acquired an estate by purchase, and the plaintiff claiming under a deed from their trustee has the legal estate.

This presents a question upon which the court have felt the most anxious solicitude, and upon which they have not arrived to a conclusion without doubt and embarrassment. It is a question of great interest to the inhabitants of the Virginia military district, as well as the parties to this suit.

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Nothing is more common than for the holder of a Virginia military land warrant to make an entry of the same, cause it to be surveyed and recorded, go into possession of the lands designated in such entry and survey, reside thereon for years, making large and valuable improvements, and die without obtaining a patent which is afterward issued to his heirs. If those heirs acquire the estate by purchase from the government, they must at law hold the same free from the debts and contracts of their ancestor; if by descent, the estate in their hands will be liable to the payment of the debts of their ancestor in the same manner and to the same extent it would had the patents issued to him in his lifetime. The question whether heirs acquire an estate in lands so situate by purchase or descent, is one, therefore, of great importance.

Nathaniel Massie, as early as 1795, made an entry of 1,900 acres, including the lands in controversy, in the books of the principal surveyor of the Virginia military district, and within a short time thereafter, caused a survey thereof to be made and recorded in conformity to the Virginia land law. He had done everything incumbent upon any holder of a warrant to appropriate the lands described in his survey, and had entitled himself to a patent therefor. He had, by the Virginia land law, acquired an indefeasible estate in the lands, and by our statutes it was subject to taxation, dower, and many other incidents of real estate.

In Kentucky, where the titles to a large portion of the real property depend upon the location conforming to the Virginia land laws, it has been held that an entry or survey is an inchoate, legal title, and that lands so held will descend, may be devised, or aliened, and are subject to be sold on execution issuing from a court of law. *Thomas v. Marshall*, Hard. 19. It would seem to follow, as a necessary consequence, \*that it must be considered as [407] legal assets in the hands of the heir, subject to the payment of the debts of the ancestor. The heir inherits it as he would any legal estate to which the ancestor had an imperfect or incomplete title.

The act of Congress of August 10, 1790 (1 U. S. Laws 252), to enable the officers and soldiers of the Virginia line, on continental establishments, to obtain titles to certain lands lying northwest of the river Ohio, etc., after various provisions respecting the locations and surveys of said lands, directs that the President shall cause letters patent to be issued for the lands designated in said entries to the persons originally entitled thereto, their

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heirs or assigns, or their legal representatives, their heirs or assigns. It is by virtue of this provision that the patent issued to the heirs of N. Massie. It is because they, standing in his place and representing him, are entitled to the same rights he had at his death. They take the same interest he would have taken had the patent issued to him in his lifetime.

The recitals in the patent show the consideration upon which it issued. The entry of the ancestor, the warrant under which it was made, the survey had thereon, and the acts of Congress regulating the appropriation of the land and the issuing of the patent, are all referred to, and all show it was not a gift by the government to the heirs of Massie, but that it was the execution of a trust in his favor, so far as the same could be executed after his death, by transferring to his heirs the naked legal title to lands which he had fully appropriated and for which he was in his lifetime entitled to a patent. There is no pretense of any consideration moving from the heirs for the grant under which it is claimed they hold as purchasers; on the contrary, the patent furnishes conclusive evidence that the consideration moved from the ancestor; that it was the services for which the warrant therein named issued, the location and survey in conformity to law, that caused the emanation of the patent. The ancestor had fully and legally appropriated the land. The naked legal title remained in the United States, as trustee, at the time of Massie's death, and his heirs procuring that legal title by virtue of the act of Congress of 1790, vested in them no greater or other estate than their ancestor would have taken had the patent issued in his lifetime.

408] \*It was said in Shelly's case, 1 Rep. 98: "When the heir takes anything which might have vested in the ancestor, the heir should be in by descent. Then, although it first vested in the heir, and never in the ancestor, yet the heir shall take it in the nature and course of descent," and the principle was adopted by the court in giving judgment. In Wood's case, reported in 2 Rolle, determined in the court of wards, 3 Eliz., and recognized as law in Shelly's case, it was held "that if a man seized of the manor of S. covenants with another that when J. S. shall enfeof him of the manor of D., then he will stand seized of the manor of S. to the use of the covenantee and his heirs. The covenantee dies, J. S. enfeofeth the covenantor, the heir shall be adjudged in course and nature of descent, and yet it was neither a right, title, use, nor action that

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descended, but only a possibility of a use which would neither be released nor discharged, yet it might, if the condition had been performed, have vested in the ancestor."

It will be readily perceived that this case is stronger in most of its features than the case at bar. The covenantee had no estate or interest in the land; none was to arise except upon the happening of an uncertain event which did not take place until after his death. In the present case; the ancestor had done all that was required by law to perfect his claim to a grant from the government. His estate was not dependent upon any uncertain event. There was no contingency which could enlarge or diminish his estate, the mere form of sealing the grant was only wanting to evidence by the highest and best title known to our laws, his interest in the lands. He could have assigned the entry and survey, and the assignee would have been entitled to a patent in his own name, or he could have devised it, and the devisee would have had an indefeasible estate. He could have maintained ejectment against any person not having a grant from the government. In short, by his warrant, entry, and survey, he had acquired an incomplete or inchoate legal title to the land designated in his entry; this right and title was not destroyed by the death of the ancestor, but descended to the heir as part of his estate; and if a patent afterward issued to the heir it does not enlarge his estate or increase the quantum of his interest in the land, but changes \*the [409 evidence of his right from an entry and survey to a grant from the government in whom the mere legal title was vested in trust for those who should legally appropriate the land.

The case of *Chapman v. Dalton*, Plowd. 284, is, although not strictly analogous, illustrative of the same principle. D., the defendant, leased land for twenty-one years to J. C., and covenanted with lessee to make to him and to his assigns a good lease for twenty-one years, to commence immediately after the end of the first term; the lessee dies, having appointed an executrix; the executrix makes her executor and dies; the first term expires. It was held that the executor of the executrix of the covenantee should have an action of covenant for the second lease, and that it would, in his hands, be legal assets. The reasons of the court are not given in the report, but the decision is obviously on the ground that as the covenant was made with the first testator, the title thereto was derived from him to the plaintiff, and that which is

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done, in performance of the covenant, ought to be in the plaintiff, in the same degree, as the covenant was in him, so that he shall have the lease in the like manner as he had the covenant.

If a lease, made to an executor in performance of a contract with the testator, would be legal as contradistinguished from equitable assets, in the hands of such executor, and for the reason that the right to such lease was derived from the testator, then it would seem that, by analogy, the heir would take by descent those lands, the right to which the ancestor had by contract with government, and in performance of which contract a patent had issued to the heir.

It was held by the court of appeals in Kentucky, in *lessee of Gist's heirs v. Robinet*, 3 Bibb, 2, that a right to land, under the proclamation of 1763, neither located nor surveyed, could be devised; and although the devisor, after making the will, procured a warrant, caused a survey of the lands to be made, obtained a grant therefor, and died without republishing his will, it was decided that the devisee should hold the lands, the court at the same time recognizing the principle that lands acquired after the making of a devise could not pass thereby. In this case, although the warrant, entry, survey, and grant were all after the devise, 410] yet they were all in execution of, and had reference to \*the proclamation of 1763. By the issuing of the grant to the devisor, subsequent to the making of the will, he did not acquire a new estate; it was not, in the language of the books, lands acquired after making the devise, or they would not have passed by the will, but descended to the heir.

"In case of an exchange, one of the exchangers enters, the other dies before entry; now the heir of him that had not entered may enter, and he shall be in by descent, although the father never had anything in it." *Jenk.* 249; 14 *Vin.* 260. This is on the same principle recognized in *Shelly's case*, that if the act, which is to perfect the title to the estate, might have taken place during the life of the ancestor, the heir shall be in by descent, although in fact the title was first perfected by the heir, and by his act. In the case at bar, the only act necessary to perfect the title in *Nathaniel Massie* was the sealing the patent. This act might have taken place in his life, and would have perfected in him the legal title to the lands designated in his survey; the legal title is, after his death, perfected in his heirs by the doing of the only act necessary

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to complete it. It would seem to result, from the authorities cited, that they would be in by descent, and not by purchase.

In the case of *Smith v. Trigg*, 8 Mod. 23, it was held that if a copyholder surrender to the use of his will and devises to his heir, and then dies before admittance, the heir, after admittance, shall be in by descent.

In the case of *Marks v. Marks*, 10 Mod. 425, where lands were devised to be for life, remainder to B. in fee, provided that if C., within three months after the death of A., the tenant for life, should pay B. five hundred pounds, then to C. and his heirs. C. died during the life of the tenant for life, who afterward dies, and it was held that the heir of C. should be allowed to perform the condition of paying the money to B., and that he should take the land in course of descent from his ancestor C. Here, by the will, a mere executory contract is limited to the ancestor, without in terms being extended to his heirs, and by performance of the condition the estate might have vested in him. The right to perform this condition descends to the heir; the vesting of the estate is a necessary consequence of such performance, and the court therefore hold that the heir \*shall be in the estate by descent, [411 because the right to perform the condition upon which the estate depends came to him by descent.

It is a general rule that the heir shall not take by purchase when he may take the same estate in the land by descent. 7 Cranch, and the authorities there cited.

If a man devises to his heir at law an estate, neither greater nor less than he would have taken without such devise, he shall be adjudged to take by descent, even though it be charged with incumbrances. 2 Bl. Com. and authorities there cited.

In Vent. 372, the court say it is a long-established rule that "a man can not, either by conveyance at the common law or by limitation of uses or devise, make his right heir a purchaser."

The court are of opinion that as the patent must have issued to Nathaniel Massie, had he been alive at its emanation, as he had at the time of his death an inchoate legal title to the lands designated in his survey, which could be transferred, was subject to dower, the payment of taxes, and many other incidents of real estate; as he had a right to a patent therefor, which right vested at his death in his heirs, and the patent issued to them from necessity, occasioned by his death; that they, standing in his place, and

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representing his rights, are, by the principles of the common law, in this estate by descent, and not by purchase.

This opinion renders it unnecessary to give any construction to the two acts of the legislature, vol. 18, p. 93, and vol. 19, p. 80, appointing a trustee for the heirs of Nathaniel Massie, deceased, or to determine the effect upon this case of the provisions therein contained, that the title which shall be acquired by said heirs, by virtue of any proceedings under said act, shall be considered in all courts as being taken by descent.

The only remaining question necessary to be considered is, whether the heirs of Nathaniel Massie, and those claiming under them, are estopped from denying his title to the lots in controversy, or, in other words, whether the patent inures to the benefit of the purchasers from Massie, and those deriving title from such purchasers.

Massie, after making his entry and survey, and before the issuing 412] of a patent, conveyed the lot in question to Basil \*Abrams for a valuable consideration, by deed of bargain and sale, with covenants binding himself and his heirs to warrant and defend the title.

The authorities, both English and American, abundantly and clearly show that had N. Massie, after executing his deed to B. Abrams, acquired, by patent from the government or otherwise, a perfect title to the lands conveyed by him, he, his heirs, and all others claiming under him, would have been estopped from setting up the after-acquired title to the prejudice of his grantee. 1 Ld. Raym. 729; 12 Johns. 201; 13 Johns. 316; 4 Bibb, 436. In Coke Litt. 352, a, it is expressly said that privies in blood, as the heir, are bound by, and may take advantage of estoppels.

The heirs of Massie, standing in his place and inheriting from him, are bound by his warranty, and estopped by his grant from controverting the goodness of his title at the time he conveyed.

If the heirs of Massie could recover these lands on the ground that their ancestor, when he conveyed, had not a perfect legal title, they, claiming by descent from him, would be responsible in consequence of such recovery to his grantee, and those claiming title from him, upon the covenants of warranty contained in his deed, and it is to avoid this circuitry of action that the heir has been held to be estopped from denying the title of his ancestor.

This doctrine would not apply were they purchasers from gov-

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ment; but having derived all their interest in this estate by descent from their ancestor, Massie, they are stopped by his grant, and bound by his covenants, in which they are named.

We have no doubt that N. Massie, after his entry and survey, had a right to dispose of and alien the lands included in such survey; and when a patent afterward issued either to him or his heirs, whereby the legal title was perfected, it inured to the benefit of his grantee, and all persons claiming under such grantee, so as to perfect their title.

This opinion renders it unnecessary to examine the title of the plaintiff to the lot in controversy; the defendant having the legal title is entitled to judgment upon the verdict. The motion for a new trial must be overruled.

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\*RICHARD DOUGLAS v. JOHN WADDLE.

[413]

*Indorsers—Securities.*

Indorsers of promissory notes, indorsed for the use and accommodation of the drawer, are co-securities, and the last indorser can not recover more than a contributable share against a previous indorser.

THIS was an action of assumpsit. The declaration was by the indorsee of a promissory note against his immediate indorser; it contained also the common money counts. The cause was tried in the supreme court of Ross county, and a verdict given for the defendant. A motion was made for a new trial, and the decision of the motion referred to this court for decision.

The facts were these: On the 6th of October, 1818, a note, drawn by James Barnes, payable to the plaintiff, Douglas, and indorsed by Douglas and the defendant, Waddle, was discounted by the office of discount and deposit of the Bank of the United States at Chillicothe, where it was made payable, and the proceeds drawn upon the check of Waddle, the last indorser, and carried to the account of Barnes, the drawer. Though treated in form as a real note of business, it was, in fact, for the accommodation of Barnes, the drawer. Four notes were successively drawn, indorsed, and



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discounted in the same manner, and the proceeds of each successive note applied to discharge the amount due upon the one preceding it. A note was then drawn by Barnes, payable to the defendant, Waddle, and indorsed by him and one Hoffman, discounted and applied as before. Four notes were again successively drawn by Barnes, payable to Waddle, and indorsed by Waddle and the plaintiff Douglas, and the proceeds applied in the same manner. The last of these was the note in question, upon which suit was brought by the bank, under the statute against drawer and indorsers as co-defendants, and judgment and execution had, upon which the plaintiff and defendant each paid half the amount, and the plaintiff claiming that the defendant was liable to him for the amount by him paid, obtained the note, struck out his own indorsement, and brought this suit.

BRUSH and FITZGERALD, and DOUGLAS, for the plaintiff:

The right of the plaintiff to recover depends upon long-established and well-settled principles of mercantile law. \*So soon as a promissory note is indorsed, it assumes the same character, and becomes subject to the same rules, as a bill of exchange. The indorser is the drawer, the maker of the note the acceptor, and the indorsee the payee, or person entitled to receive the money. This was settled in the case of *Heylen and others v. Adamson*, 2 Burr. 676, and has since been strictly adhered to. Upon this state of the law Douglas, to whom Waddle indorsed the note, was entitled to recover the amount from Waddle, the indorser. That he himself sold the note, and was afterward compelled to pay it and take it up, does not alter his rights.

The ground of defense taken in this case is: That this was an accommodation note, drawn by Barnes, and indorsed by the plaintiff and defendant for his accommodation; that as between them it was not a real transaction; no consideration was paid by either to the other; that though it assumed the form of a real making and selling a note, it was, in fact, but an agreement that the indorsers should become securities for the drawer. It is, however, well settled, both in England and America, that in an action by the holder of a note or bill, against drawer, acceptor, or indorser, the fact that the defendant made, accepted, or indorsed the paper for the accommodation of another, without consideration, can not be set up as a defense. *Charles v. Marsden*, 1 Taunt. 224;

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Smith v. Knox, 3 Esp. 46; Wiffen v. Roberts, 1 Esp. 261; 2 Caine, 343; 7 Johns. 361; 18 Johns. 327; 14 Cranch, 141; 2 Litt. 174.

The statute of this state, authorizing a joint suit against drawer and indorsers, is supposed so to operate as to make them principal and securities; and the decisions under it, with respect to execution going against principal and surety, it is contended, must be founded on that doctrine. This inference is not a just one, as it relates to this case, because the statute was unnecessary, if without it the holder of the paper could consider drawers, acceptors, and indorsers, as joint debtors, against whom he could proceed jointly. This is pretended by no one. Besides, the statute distinctly contemplates a separate defense. In Kentucky they have a similar statute, and there it has been expressly adjudged that one indorser can not have contribution against another, because their undertaking is not joint but several. 2 Litt. 174.

\*It is urged that there is a *general understanding* throughout [415] the state, among those who indorse accommodation paper, that they are joint securities, and that this *general understanding* constitutes the law. *General understanding* is certainly a new agent in legislation—a new source to supply a rule of civil conduct in our country. Whatever matter may be given in evidence to defeat a recovery, may generally be pleaded in bar to the action; and if *general understanding* may make the law in one case, it may in another. Establish the doctrine as now contended for, and we must hereafter add a new title in our treatises on pleading—the title of “*general understanding*.” We must have a plea of the *general understanding*, and a series of decisions establishing the state of facts which shall constitute this *general understanding*, and declaring the rules of evidence by which it shall be proven. Certainly this notion of a rule of law, founded upon *general understanding*, is too absurd to be seriously considered. It bears no analogy to the doctrine of general or special customs, which, in a few cases, are held to constitute a peculiar law.

But it is denied that any such *general understanding* prevails in the state. None such was proved on the trial of the cause. The attempt to prove it was overruled by the court, which, of itself, is decisive that it can have no just weight in deciding the motion under consideration.

The principle contended for must, in its application to all the various subjects connected with it, subvert the whole system of

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mercantile law in relation to bills of exchange and promissory notes.

It subverts the rules of evidence, because it permits parties to prove facts inconsistent with the legal interpretation of their contracts, as reduced to writing. The note and the indorsements considered, as the writings themselves import, constitute several separate undertakings to pay money, and unless explained by the proof of other facts, must be so understood and adjudicated upon. Proof is let in that the whole was an affair for the accommodation of one of the parties, and by this proof the effect of the writings is totally changed. They are no longer separate contracts, founded upon separate dealings, but are one joint contract, founded upon 416] a single transaction, and the consequent rights of the \*parties are placed upon a different foundation. It is not easy to foresee what may result from an innovation like this upon well-settled usages.

It must affect the certainty and uniformity of character hitherto attached to these instruments. They mean one thing in the hands of one set of men, and another thing in the hands of another set. And their character must depend upon parol proof whether the holder was a party to the original transaction, and whether that was one of accommodation or otherwise. The perjury of a single witness may thus render a genuine note or bill of totally different value to him who holds it from what its face imports, and from what he may have received it for in market.

If, as between the original parties, an accommodation bill or note is but an agreement of some to become security for others, it must, upon principle, retain this character in the hands of all who receive it, with notice of that fact, and be subject to all the doctrines in relation to principle and surety, whatever they may be.

An accommodation note, drawn and indorsed in this state by one indorser, and in the State of New York by another, must be subject to the operation of different rules of liability. If the indorser in New York can reach his previous indorser, in the tribunals of that state, he will be liable, but not liable if brought before our own courts.

It is well understood that the undertaking of the indorser of accommodation, as well as real paper, is conditional. His agreement is that he will be liable if the holder demand payment at the

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proper time and place, and in a proper time and manner notify him that payment is not made. Two difficulties in relation to this must be introduced by the doctrine now insisted upon. The undertaking to the real holder of the note is totally different from the agreement between the parties. And their respective liabilities must depend, not upon their own contract, but upon the act of the holder. If there be more than one indorser, and the holder fail to notify one of demand and non-payment, so as to charge him, the joint contract is put an end to. The indorser charged can have no redress against his co-indorser for contribution, and if the holder choose to charge the first indorser by a notice, no act of his can subject the second \*indorser. Indeed, it is not [417 perceived, even if all the indorsers be charged properly, if the holder choose to collect the amount from one, how the others are to be redressed.

When the parties intend to make a joint contract and a joint liability, it is easy to do so. Had that been the intention here, the note could have been drawn payable to both indorsers, and then a joint indorsement would have created a joint liability. But when the written contract of the parties creates, in law, separate and not joint liabilities, there can be no reason for making a new contract between them, more especially when to do it, introduces a new doctrine, the consequences of which can not be anticipated, and the very introduction of which is a subversion of an existing rule of long-established authority in the countries from which we derive our maxims and rules of jurisprudence in other cases.

KING and LEONARD, for the defendant:

The single question to be decided in this case is, whether indorsers on accommodation paper are, as between themselves, to be considered co-securities, or whether they are separately liable as well to each other, in their order of indorsement, as to the holder of such paper.

It is not admitted that this question has been anywhere distinctly decided; although it is evident, from the cases cited, that points have been ruled which seem to involve the decision that no distinction exists between accommodation and other paper. But the opinion seems to have been adopted as a matter of course, without inquiry as to the foundation upon which it rests.

In England, the law merchant is a peculiar branch of their mu-

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nicipal code. It is founded entirely upon customs prevalent among merchants. These customs have been, from time to time, found by the verdicts of juries, as different questions arose, and after having been found upon proof, in a few cases, have been received, in other cases, as established without proof. The days of grace allowed upon bills and notes is of this character, so is the time of making demand and protest, and the manner of giving notice to indorsers of non-payment. On this subject it has been decided by our own Supreme Court, that a custom of making this demand 418] \*and giving notice on the fourth day, prevalent in the Bank of Chillicothe, was binding upon those who transacted business in that bank, or in other banks at that place, although this custom or mode of doing business was not according to the general law.

We all know that this decision did not and could not proceed upon the old common law doctrine of custom, which is a different thing from the custom of merchants. The latter means, in fact, nothing more than a *general understanding* as to the mode of transacting a certain business by those engaged in the transaction of that business. This *general understanding* is considered as entering into, and forming a part of their contracts, in reference to which they are to be interpreted and enforced.

The forms of drawing and indorsing these instruments are not of the inflexible character assumed by the opposite counsel. If an indorser be sued, it is competent to prove that the paper was drawn for his accommodation and the proceeds received by him, to answer an objection that notice was not given. It is only a different application of the same principle to receive evidence that the paper was indorsed by all the indorsers as accommodation paper.

The understanding upon this subject, among those who have indorsed, has been general. Parties who have become liable as indorsers have apportioned the loss among themselves without controversy. In this very case it was so apportioned. The plaintiff then so understood the law. His suit is founded upon a new *understanding* of it.

His first *understanding* accords with the strictest rules both of justice and equity. Where two persons lend their names to a mutual friend, one ought not to bear the whole loss. More especially a technical rule of law ought not to be got up to fix that loss upon him, contrary to the mutual *understanding* of all the parties.

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We do not ask to subject a particular contract, to be interpreted by a *general understanding*, in relation to such contracts. We ask only to have this particular contract interpreted as the parties themselves understood their respective liabilities, and we introduce the *general understanding* to illustrate and strengthen the position we take.

\*The eighth section of the act regulating judgments and [419 executions, passed February, 1820, directs that "where judgment is rendered upon any bond, sealed bill, promissory note, or other instrument of writing, in which two or more persons are jointly or severally bound, if it shall be made appear that one or more of said persons signed the same as surety or bail for his co-defendant, it shall be the duty of the clerk entering judgment thereon to certify which is principal debtor, and which is surety, and the act further provides that, in such case, the property of the principal shall be exhausted, before that of the security shall be taken in execution."

It has been again and again decided that under this law, indorsers of accommodation notes are sureties, not liable to have their property seized in execution until that of the principal is exhausted. It is the settled practice, not only in the state courts, but in the Circuit Court of the United States. And in that court it was sharply contested by the counsel for the Bank of the United States. The judge justly remarked he could not blink so hard as not to see the real nature of the transaction, because the forms of doing business were of different import. If the plaintiffs are right, this practice is wrong. As it has universally obtained, no better evidence could be adduced of the *general understanding*. For it could not have obtained, had a different sentiment prevailed.

The inconveniences suggested by the plaintiff's counsel are more imaginary than real. They are founded upon adjudications as to real business paper, where the making and the indorsing were in fact separate contracts, arising upon separate considerations. To these they are applicable, and with respect to these it would be unsafe to attempt innovations. A different *understanding* has prevailed, and been the basis of very extensive credits and dealing. No mischiefs have resulted. And it is not probable that a decision declaring the law to be as parties have understood it, and acted upon it, will introduce mischief—a different decision would be likely to introduce many mischiefs, by leading to the

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ripping up of settlements made, and disturbing rights long adjusted.

420] \*By the Court:

The principle that the indorsee of a negotiable promissory note may sustain an action against a previous indorser, upon the indorsement alone, without showing other consideration, was originally settled upon sound and correct notions of justice. And, in its application to a proper case, it is a rule which ought not to be disturbed. A promissory note was created as evidence of a real debt due from the maker to the payer. It was received and held as such. If transferred or indorsed by the payee, the indorsement was a real separate contract between the indorser and indorsee of the note; the latter received it for a consideration paid, and hence the indorsement, like the making, was held to be evidence of a debt due from the indorser to the indorsee. The same fact attended every subsequent indorsement, and attached to it the same consequences. As between parties to a note thus made and indorsed, the principle maintained by the plaintiff is well applied. But where the transactions of the parties are, in fact, of a totally different character, neither the reason of the rule, nor the justice of the case, admits its application.

The form of transacting a real business was in time used for the creation of an artificial credit. Notes were made, indorsed, and thrown into the market for the purpose of raising money for one of the parties only, the others being in fact securities, and receiving nothing whatever upon their indorsements. It is urged that in England and in some of our sister states, this species of notes is placed upon exactly the same foundation with real paper, and that no distinction can be safely made between the two classes. So far as it relates to the interest of a *bona fide* holder, who has advanced his money, this is right and just; and so far the rule rests upon authority. There is no decision adduced by which it is adjudged that this rule is inflexible in its application to the original parties who made and indorsed the note, and between whom nothing was paid. And, if a direct authority did exist in another country, we should feel ourselves bound to examine the subject upon principle before we adopted it here.

In this country the parties to this description of paper usually  
421] understood their relation to be that of principal \*and security, and upon this understanding they have generally acted, both

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in creating the paper, and in adjusting their liabilities upon it. Were it fully admitted that no rule of law could be founded upon *general understanding*, the admission would have no bearing in this case, where the inquiry is, whether the form of creating a note, and putting it into market, shall absolutely settle the rights of those concerned, contrary to their own understanding of the matter. When the litigation is between the original parties, we are of opinion that the form of making and indorsing a note does not preclude an inquiry as to what the parties intended, and what was the real transaction between them. And the propriety of making this investigation is the more manifest from the well-known fact, that many more notes like this are created artificially in this country than are made and indorsed upon actual dealings between the parties.

The real principle upon which the plaintiff proceeds, is that he purchased the note from Waddle and paid him a consideration for it. He must be the owner of the note or he has no right to recover in an action founded upon an indorsement on it. It appears from the evidence, that Waddle, when he indorsed the note, delivered it to Barnes, the drawer, who took it to the plaintiff and obtained his indorsement. When the note was handed to Douglas it was not for the purpose of vesting in him any property. Suppose he had retained it then and brought this action; would any lawyer contend that parol evidence to explain when the note was made, and how Douglas became possessed of it, could not be received? It is assumed that no lawyer would attempt this, and if Douglas had not then an interest in this note, upon which he could sustain this action, how, and when did he acquire such an interest? He could not acquire this interest by subsequently paying half the money due upon it; for that payment only entitled him to demand the amount paid from him for whom it was made; it could invest him with no new interest in the note. It is therefore clear, that if Douglas can maintain an action upon the indorsement, it must be in consequence of the interest acquired in the note by Barnes' handing it to him for indorsement; and that he then acquired no interest \*upon which he could maintain [422 an action, admits, we think, of no doubt. He knew that Waddle did not, in fact, own the note, but had indorsed it for the accommodation of Barnes, as a security. He knew that he himself indorsed it for the same purpose, and not as owner; it was intended to pay



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a debt due from Barnes, who, and not Waddle, was the person to be benefited. Douglas himself never had a beneficial interest in the note; and the money paid by him was paid for Barnes, not for Waddle. He therefore can have no action against Waddle for the amount.

Cases have occurred without number in which two or more persons have indorsed notes to be discounted in bank, when neither would have indorsed alone, because no one of them was willing to risk the payment of the whole debt; and when the requisite number of indorsers have been obtained, they have paid no attention to the order in which they placed their names on the paper. Such was the fact in this very case. This could only arise from a distinct understanding among the parties, that the indorsers stood in the relation of sureties to each other.

By the nineteenth section of the act regulating judgments and executions, we are directed to receive parol proof when one or more of the defendants signed the note as securities, and it is made the duty of the clerk, upon such proof, to certify which of the defendants is principal debtor, and which is security, in order that the property of the first may be exhausted before execution can be levied on the latter. We have uniformly understood this law as applying to the indorsers upon accommodation notes, and have so applied it, and this could be done upon no consistent principle but that of considering such indorsers as securities.

The defendant, under this statute, might, when judgment was rendered against the drawer, the plaintiff and himself, have applied to have the certificate made that he, with the plaintiff, were sureties. Upon the proof in this cause the certificate must have been made. It would be absurd to consider and treat them as securities as between them and the creditor; but between themselves as parties to separate contracts.

423] \*Where the original transaction was in its character and object that of principal and security, the court, as between the original parties, will so consider them, no matter what form may have been given to it; and where there are two or more indorsers upon an accommodation note, all of whom indorsed before the note became operative by being transferred to some person not a party, for value received, and all of whom are charged by notice of demand and non-payment, they shall be treated as co-securities, and contribution shall be made between them as such. In this

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relation the plaintiff and defendant stood to each other. Each has paid his half upon the principle of being joint securities. The plaintiff can not recover in this action.

With respect to the various difficulties urged by the plaintiff's counsel as necessarily resulting from this decision, it appears to the court that the opposite counsel have sufficiently answered them. If, however, the salutary and just principle upon which this decision is predicated can not be extended to every case without too great innovation upon established doctrines, the only consequence will be, that it must be limited to cases situate as this. It will be time enough to meet these suggestions when a case arises in which they are presented for determination.

See *Renner v. Bank of Columbia*, 9 Wheat. 582.

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JACOB HUDDLE v. THOMAS WORTHINGTON.*Condition—Covenant.*

A declaration in a covenant, founded on the condition of a bond containing no express agreement, is bad.

THIS was an action of covenant. The declaration contained a single count, as follows: "For that, whereas, by a certain writing obligatory, commonly called a title bond, executed, etc., in the usual form, it was concluded and agreed, on the part of the defendant, in manner following, to wit: the defendant by the same writing obligatory did covenant, promise, grant, and agree to, and with the plaintiff and his heirs, that the said defendant should and would, on or before the 20th day of August next ensuing the date of said bond, by a good and sufficient general warranty deed in fee simple, convey unto the said plaintiff or his heirs a certain [424 tract of land, etc., alleging a breach for non-conveyance.

The defendant craved oyer of the bond, the penal part of which was in the usual form for the payment of a sum of money; he also craved oyer of the condition, which was in the following words: "The condition of the above obligation is such that if the above-bound T. Worthington shall convey, by a good and sufficient gen-

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eral warranty deed, in fee simple, on or before the 20th day of August next after the date hereof, to the said Jacob Huddle or his heirs, a certain tract of land, etc., then this obligation to be void," etc. Upon this the defendant demurred to the declaration, and the decision was adjourned to this court by the supreme court sitting in Ross county.

CAREIGHTON and BOND, for the plaintiff:

We suppose that both the principle that an action of covenant lies upon the condition of a bond like this, and the mode of declaring which we have adopted, rest upon the authority of adjudged cases.

The case of *Ward v. Johnston*, 1 Mun. 45, was an action of covenant upon the condition of a bond to convey land. That condition differs in nothing from this, except it contains a recital that land had been sold. The declaration was upon the condition alone, reciting that the covenant was made under a penalty. And here we say that the covenant was made in a title bond, which is substantially the same.

The case referred to was much litigated. In the court of appeals Mr. Wickham made the same objection taken here, but cited no authority in support of it. In reply Mr. Wirt cited 6 Viner, 376, p. 4, as being full in point to support the action. The judges gave their opinions *seriatim*, and no notice whatever is taken of the point that covenant would not lie upon the condition. The decision is that the action was well conceived, which could not be if this point was well taken.

*Kennedy v. Kennedy*, 2 Bibb, 264, is also a case of covenant brought upon a penal bond conditioned for the conveyance of land. The exact mode in which it is declared upon is not stated. But the 425] action is sustained expressly by the \*court upon the ground that the condition setting forth that land is to be conveyed contains the agreement of the parties, and therefore amounts to a covenant, and the court refer to and adopt the doctrine of Lord Mansfield, 2 Burr. 826, that "*the condition of a bond is an agreement in writing.*"

The case of *Dougherty v. Llewellyn and Stewart*, 3 Bibb, 364, is distinctly stated by the court to be "*a suit in covenant brought upon the conditions,*" and they also state the first question made, to be, "*can an action of covenant be maintained on condition of the bond.*"

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They decide that it can be so sustained, and there is nothing that we can perceive to distinguish that case from this.

LEONARD, for the defendant:

In support of their mode of declaring, the plaintiff's counsel have cited several authorities, and in one case have referred to the argument of Mr. Wickham. We also refer to that argument; and it will be seen that he lays down the law as it is laid down in Comyn's Digest, Covenant, A. 2, that covenant lies on a deed wherever there is an express agreement, or one is distinctly implied by the terms used in it.

On a bond to pay money to be defeated by the performance of a condition, debt or covenant will lie on the penalty. At common law the party had his election to pay the penalty or to perform the condition. At common law he is not considered as stipulating to perform the condition, but as agreeing to pay the penalty, with the liberty of saving himself therefrom by performing the condition. It is in fact an alternative agreement. Courts of equity, however, interfered both to relieve the party from the payment of the penalty, as also to enforce the specific performance of the agreement contained in the condition. This, the courts of law strenuously resisted, and Lord Coke, I think, particularly distinguished himself in the contest. The court of equity considered the construction put on penal bonds as narrow. But both the courts of law and equity adhered to their respective constructions. Where, therefore, Lord Mansfield says the condition of a bond is an agreement, he means it is so considered by courts of equity, and so he expresses himself directly afterward. If an action of covenant may be brought directly on the condition, in what \*light is [426 the penalty to be viewed? What is the amount of damages the jury may assess? Strictly they should assess the damages sustained; suppose they exceed the penalty, are the jury to be restrained to that amount? They may find less, why not more? The penalty is not the stipulated damage in case of a failure to comply with the condition. As the condition alone, and without aid of the penal part of the bond, comprises an agreement, and the action is brought directly thereupon, for not complying with that agreement, I see no reason why we should not go further, and say the jury must assess the damages really sustained, without any limitation on account of the sum mentioned in the penalty.

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Where a party enters into covenants to perform certain acts, and in the agreement there is also comprised a stipulation that in case of failure therein a certain penalty shall be paid, an action of covenant lies upon the covenants, and the amount to be recovered therein is by no means limited by the penalty, or an action of debt may be brought on the penalty, and the amount thereof only recovered. In such an article of agreement there are covenants to do certain things, for the breach of which damages without stint may be assessed by the jury; as there is also a penalty imposed on the party which may likewise be foundation of an action of debt on failure to comply with the covenants in the article. Look, then, at the case of a bond made by several, the one as principal, and the others as sureties, with the collateral condition that the principal should build a house, go to Rome, or convey a tract of land. If this condition comprises an agreement at law, an action of covenant might be sustained thereon, against the principal, for omitting to do these several acts, as likewise against the sureties for the breach of the covenant on their part, made that the principal should perform them. Thus the sheriff and his sureties would all be liable, in an action of covenant, for the sheriff's neglect in discharging his official duties. For most assuredly if there is an agreement, on the part of the sheriff in the condition of his bond, to discharge those duties, there is also an agreement on the part of the sureties to the effect that the sheriff shall not neglect them; and thus sureties might be held beyond the stipulated penalty of the bond, and so the matter is viewed in the case cited from 1 427] Munf. 54. \*"Although I admit an action of covenant will lie on the penalty of the bond where the obligor binds or obliges himself to pay the same, or in any way stipulates that he will pay the penalty, as by saying he is content to pay the same, or otherwise, yet so far am I from admitting that an action of covenant will lie on the condition, that I think, and will cite an authority for my opinion (*vide* Hard. 178), that a bond may be so framed that an action of debt only will lie on the penal part of the bond. Debt is the proper remedy, where there is a debt only, covenant where there is an agreement to pay money. If the obligor *obliges* himself to pay, here is a covenant. If he says that he acknowledges himself indebted, here is no stipulation to pay, here is only an admission of a debt, and that admission liable to be defeated by the performance of the collateral matter stipulated in the condi-

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tion; and this is the substance of what is said by the chief baron in the case last cited from Hardre. Would it not be going far to say that although an action of covenant can not be brought on the penalty, yet it may on the condition, and I am satisfied that the court, if they look at the authorities cited in Comyns' Digest, Covenant A. 2, Action M. 4, and those mentioned in Chitty's Pleadings, 109, Covenant, will come to the conclusion that the sealed acknowledgment of a debt will not support an action of covenant, which will only lie where there is some sealed-engagement to do some certain act, which engagement is not complied with. See the absurdity of such a case as the following: A man covenants to do certain acts by deed, he afterward enters into bond, conditioned to perform the covenants contained in the first deed. An action of covenant might be brought on the covenants contained in the condition of the bond, for not keeping his covenant, to keep his covenants in the first deed, and another action on the first deed for breach of those covenants. Take a bond conditioned that Lafayette should come to America; or that General Jackson should be president. Will an action lie on the condition, an action of breach of covenant, because General Jackson was not elected president, or Lafayette did not come to our country? Was that the understanding of common lawyers anterior to the statute of William? Ah! but that statute has altered the common law. To be sure, but how? By making it compulsory, \*on the party, to have. [428 his damages assessed for breaches of the condition, and enabling him to assign more than one breach. Is not that the whole and entire effect of the statute? Does it alter the form of action, or make that a covenant, which was only a condition? Had we not better adhere to the old law as it stood, where there is no reason for alteration, and the more especially, where the alteration would be accompanied with many inconveniences, and would introduce inconsistencies and improprieties into the technical parts of the law? To use an expression of the venerable Judge Reeves, would it not "*mar the symmetry of the law?*"

HAMMOND, in reply:

In all penal bonds, the condition is introduced to set out the real agreement between the parties. It contains the contract. The obligatory, or penal part, is in fact no part of the agreement. It is so treated by courts both of law and equity, unless at law the

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pleadings omit to make a case in which the condition can be noticed.

In the present case, the agreement was to convey a tract of land—a bond is given, the condition of which is, that the defendant shall convey to discharge the *obligation*, otherwise it remains in full force. The conveyance is not made, but certainly that does not defeat the contract. The purchaser has a right to the land, founded upon the contract, not to the penalty only. The condition, in all such cases, must include a covenant that the obligor will do what the condition states is to be done. If this covenant be necessarily included in the condition, then an action can be brought upon it.

It is asked, what in such case becomes of the obligation or penal part? By electing to sue upon, and enforce the condition, the obligee waves his right of action for the penalty; and in assessing damages, except against securities, no notice is taken of it. The obligee is not limited against the principal to the amount of money named in the penalty, if his pecuniary loss by the non-performance exceeds that sum. As against securities it is held that they have fixed the amount to which they agree to be liable in the penalty, and can not be charged beyond that amount. Was covenant, in 429] such case, brought against securities, the jury would \*be restrained from giving damages beyond the amount of the bond. But the principal stands upon different ground. He is liable to the other party for his actual damages. If these exceed the amount of the condition, a jury may give them, whether covenant be brought upon the obligatory or penal part of the bond.

Because a case may be supposed, in which covenant can not be brought upon either the obligation or condition of a bond, that fact furnishes no argument against sustaining the action where the terms of the writing admit of a different construction. In this case the condition contains an agreement to convey land. It can receive no other rational interpretation. It is clear, from the whole writing, that the contract was for the sale and conveyance of the land named in the condition. The writing imposes upon Worthington an obligation to convey. He has covenanted to do it. This is the manifest implication; and upon principle, as well as upon the authorities cited, the action is well brought.

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By the Court :

We are of opinion, that an action of covenant can not be sustained upon the condition of a bond like this, separated, as it is in the declaration, from the penal or obligatory part of the bond. It might be different, if the entire bond was declared on, as in the case in 1 Munford, stating that the covenant was made under the penalty in the obligatory part specified.

Judgment must be for the defendant.

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CURTIS AND WILKINS v. CISNA'S ADMINISTRATORS.

*Judgment at Law—Assignee—Equity.*

Questions litigated and decided in an action at law can not, as of course, be re-examined in equity.

Assignee of an agreement concluded in equity by decision at law against his assignor.

THIS case was reserved for decision here in the county of Knox. It is charged in the bill, that the complainant, Wilkins, being owner of a tract of land in the county of Knox, on the 11th of May, 1816, contracted to sell it to Thomas Cisna, since deceased. That seventy sheep were delivered by Cisna upon account of the purchase money, and a written agreement entered into, by which Wilkins agreed to convey \*the land to Cisna, on or before [430 the 1st day of September ensuing, upon Cisna then paying \$100, and securing to be paid by his own bonds, and a mortgage on the lands, the further sums of \$150, payable 1st of April, 1817; \$100, 1st of April, 1818; and \$100, 1st of April, 1819. That the contract was made and executed, and deposited for safe keeping, at Mount Vernon, where, complainant understood, the parties were to meet on the 1st of September to carry it into effect. The bill further charged, that Wilkins attended at Mount Vernon on the day to execute the contract, but that Cisna did not attend. That on the 7th of September, Wilkins executed a deed to Cisna for the land, and shortly afterward caused it to be tendered to Cisna,



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at his residence in Fairfield county, and required of him to perform his part of the agreement, when Cisna refused to receive the deed, or to comply with the contract. That a subsequent tender of the deed was made to Cisna, at Mount Vernon, who again neglected to perform on his part. That Wilkins being pressed for money, about the 1st of February, 1817, assigned his contract with Cisna to Silliman and Curtis, and entered into an agreement with them, that they should use his name to enforce the contract with Cisna, they to indemnify him against any claim of Cisna, and delivered to them the deed executed for Cisna; at the same time a deed for the lands from Wilkins to Silliman and Curtis was executed and delivered to them. The bill further alleged, that Cisna was notified of the transaction, and again requested to accept the deed, and perform the contract, but did not do it; that Silliman afterward transferred his right to Curtis, who was at all times ready, willing, and able to perform the contract on his part; that while the contract remained unexecuted, Cisna deceased, and his administrators brought an action against Wilkins to recover back the value of the property received by Wilkins on the contract; that upon this trial a recovery was had against Wilkins, in consequence of the defendant not being able to prove a tender of the deed at the day, and in consequence of a defect in the proof of the chain of title at the trial. The bill prays an injunction against the judgment at law, and that the administrators of Cisna may be compelled to accept the conveyance, and pay the money.

431] \*The answer denies all knowledge of the facts set out in the bill, and calls for proof. It insists that Wilkins having conveyed to Silliman and Curtis, Cisna, or his representatives, are not bound to take from them a deed; and it sets up and relies upon the trial at law as concluding the rights of the parties under the contract, which ought not to be re-examined in equity.

The proofs substantially sustain the allegations in the bill, except that there is no testimony of Wilkins' being at Mount Vernon to complete the contract on the 1st of September. The written contract between Wilkins and Silliman and Curtis, by which Cisna's contract was assigned to the latter, contained the following reference to the contract with Cisna in describing the land: Being the same that Wilkins "had contracted to sell to one Thomas Cisna, and which contract has since fallen through in consequence of Cisna's not complying with his part."

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CURTIS, for the complainants:

The trial and judgment at law evidently constitutes the main ground of the defense; and this can not prevail either upon principle, or upon authority.

Had the interest remained in Wilkins, and should he bring an action on the contract against Cisna's administrators, could they plead the judgment in bar, or give it in evidence to defeat a recovery? Upon an executory contract, containing mutual stipulations, both parties may sustain actions at law, and a resort to equity may at last be necessary to do justice between them. Cisna may recover damages for the non-conveyance; Wilkins may recover the purchase money; and neither could plead his own recovery in bar to the action of the other; yet there might be such inequality in the different amounts rendered by different juries, perhaps in different tribunals, or such other circumstances might attend the recoveries as to occasion gross injustice, did the mere fact of a judgment at law preclude all inquiry by a court of equity.

In the case of *Rees v. Smith*, 1 Ohio, 124, decided by this court at the last term, the complainant had actually prosecuted an action at law upon the same contract against the defendant; a trial was had upon the merits, and a verdict and judgment against him. So far from regarding this as conclusive upon him, the court treat it as a strong ground for extending to him the aid of a court of chancery. "We can not," say the court, "shut our eyes on the fact, that the remedy at law has been extinguished by a judgment rendered against the complainant, by a court of competent jurisdiction, *on the ground alleged by the defendant, that Solomon Rees had not complied with his contract.*" "The accidental circumstance that the complainant's remedy at law has been destroyed by the practice of the defendant, ought *rather to strengthen than to weaken his claim to the aid of this court.*"

Here the complainant himself had resorted to an action at law: he was defeated because he had not *complied on his part* so as to entitle him to sue at law; yet this did not close against him a court of equity. Certainly the same consequence must fairly result from an unavailing attempt to sustain a defense at law, for the *same reason* adjudged untenable.

There is another reason why the proceedings at law can not

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be set up as a bar to this suit—the person in whom the *real substantial interest* was vested, was not a party to that proceeding.

Long before the commencement of the suit, the beneficial interest in the contract had been fairly transferred to Silliman and Curtis, and of this Cisna had full and complete notice.

Oh this point two propositions are insisted upon :

1. A court of equity will always protect the rights of a *bona fide* assignee to a chose in action.

2. A party having notice that his contract is assigned, in equity, can not, by any act of his own, or by any concert with the other original party, defeat or impair the rights of the equitable assignee.

The first position is asserted by the elementary writers, is sustained by the adjudged cases, and is contained in all books of reference and practice.

Blackstone, in his Commentaries, vol. 2, p. 442, distinctly asserts it; so does Powell, in his treatise on Contracts, vol. 1, p. 317. It is laid down in 1 Bacon, 249, and various authorities cited.

**433]** \*The second proposition can not be separated from the first; it is a necessary consequent. In *Martin v. Harris*, 2 Term, 595, an administratrix claimed to appropriate moneys arising upon an assigned agreement for wages, to pay off a judgment against the assignor, but the court would not permit her. The money was secured to the assignee. If the obligor pay money on a bond, though not assignable after notice of an assignment, he shall pay it again to the assignee. 2 Ver. 540; Chan. Cases, 232. If a debt or other chose in action be assigned, and the assignor release to the debtor, who has notice of the assignment, it can not affect the assignee. Ch. Cas. 169.

The direct acts of the parties to a contract can not impair the rights of an assignee. Can these rights be impaired by any indirect proceeding? The release of the assignor avails nothing. Payment by the obligor to the obligee avails nothing; a judicial decision between them can not be more operative.

When the administrators of Cisna commenced their suit against Wilkins, they knew he had no interest in the contract, upon the operation of which their right of recovery depended. No act of his, out of court, could avail anything; how, then, could he do anything in court by which the contract could be touched? Would Wilkins' default bind Curtis? Would his confession change

the rights of the parties? Could he by pleading compromise interests otherwise beyond his reach? It is certainly clear that the interests of Curtis were as incapable of being affected by the acts of Wilkins in court as elsewhere. The judgment binds the parties and interests arising after the proceedings commence. But it does not affect strangers, or interfere with interests created and vested before the institution of a suit.

It is said that Cisna could only sustain an action against Wilkins; he could not maintain one against the assignee. This is true of an action at law, but he could have filed a bill in equity against both to rescind the contract, and recover back what he had paid. If he chose to proceed at law, he must encounter the consequence. He subjected himself to the inconvenience of litigating the matter with Wilkins in one suit, and with his assignee in another. To hold Curtis concluded by the decision at law, [434] to subject his rights to be determined in a case where he was not and could not be a party, is to subvert all established principles.

IRWIN, for the defendants:

The action of assumpsit is an equitable action, and when brought to recover the amount paid upon a sale of land, on the ground of a failure of the contract, the plaintiff can recover no more than the amount paid, with interest. Such was the action brought by Cisna's administrators v. Wilkins. The right to recover depended upon the failure of the contract, and this fact is established by the judgment in the cause. It is not competent for the complainants to impeach this judgment in equity, by asking of this court now to make a different decision, unless he shows that he was prevented from making his full and fair defense at law by fraud, accident, or some act of the other party, unconnected with negligence or fault of his own. The doctrine is fully laid down in 3 Johns. Ch. 356, and 1 Schoales & Lefroy, 203, and also 2 Bibb, 6, 326.

The fact that the contract had been assigned to Silliman and Curtis can not vary the case. The right of the assignee is no greater than that of the assignor. When they bought Cisna's contract, they had full knowledge of the difficulties between the parties, and they agreed to indemnify Wilkins against all costs and damages. The failure of Wilkins to perform the contract, upon which the right of action accrued had taken place, before the as-

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signment, and the right of action, with all its consequences, was beyond the reach of Wilkins or his assignee. An assignment could not divest it out of Cisna, and the right to prosecute the suit against Wilkins included the proposition that the decision should bind all interested. It is certainly well settled that the purchaser of a chose in action takes it subject to all the equities and interests existing between the original parties. 1 P. Wms. 130, 497; 1 Strange, 244; 1 Vesey, 123; 2 Vesey, 520.

The case of Rees and Smith, relied upon by the complainants' counsel, does not seem to have any bearing on the point now in 435] controversy. There the court proceed on the \*ground of fraud and accident; there the plaintiff at law was defeated by the *misconduct* of the defendant. No allegation of that kind is made here.

Opinion of the court, by Judge HITCHCOCK :

From the pleadings and evidence in this case it is manifest that the subject matter of the present controversy has been adjudicated by a court of law, in an action commenced by the present defendants against the complainant Wilkins. The object of the former suit was to recover back the consideration money which had been paid for the land, and could have been sustained upon no other principle than that the contract had been abandoned, or put an end to by the parties. In that case full defense was made, and precisely the same evidence exhibited on the part of the defendant as on the present occasion, with the exception of the testimony of a single witness. The testimony of this witness does not materially vary the facts. Having this evidence before them, the jury returned a verdict for the plaintiff, and upon this verdict the court rendered judgment. About two years after the rendition of this judgment, the bill now before the court is filed, the prayer being first to enjoin the judgment at law, and second to enforce a specific performance of the contract.

As before observed, the court of law must have proceeded upon the principle that the contract was at an end. There can be no doubt that the subject was completely within their jurisdiction; and whether the decision of the case was or was not correct is not now a subject of inquiry. A court of chancery does not act as a court of errors, to examine or reverse the judgments of a court of law. Upon a case made which comes exclusively within the jurisdiction

of a court of chancery, and where a court of law could give no relief, chancery will interfere to enjoin or relieve against a judgment at law. But where the courts of law and of chancery have concurrent jurisdiction, and a party electing to pursue his remedy in one fails, he shall not be permitted, as a general rule, to resort to the other. It is said, however, in the present case, that the complainants seek to enforce the specific performance of a contract, which could not have been done by a court of law. This \*is [436 true; and had the present bill been filed during the pendency of the suit at law, and had no defense been made in that case, this court might, and probably would have given relief. This, however, was not the course pursued. Wilkins had a right to elect, and did elect to make full defense in that court. He preferred to submit his controversy to that jurisdiction, and after a full examination the decision was against him. In this decision he acquiesced for two years or more, and, when threatened with execution, comes into this court to have the matter tried over again. I think he is too late, especially if, in addition to the other circumstances, we take into consideration the fact that Cisna, the person with whom the contract was originally made, is dead, and that this suit is prosecuted against his personal representative.

The complainants, aware of the difficulty they have to encounter in consequence of the decision at law, undertake to distinguish this from ordinary cases. It seems to be admitted that if Wilkins were the sole complainant before the court, the judgment at law would be conclusive, and the bill must be dismissed. But it is argued that Curtis was not a party in that case, and no person who has not had a day in court, none but parties and privies, can be concluded by a judgment at law or a decree in chancery. It is urged that Curtis alone is the meritorious and interested complainant—that Wilkins has no interest—that he is joined from necessity, or for the sake of form, in order to obtain the injunction—that inasmuch as Curtis has had no day in court he has now a right to be heard—and that the judgment against Wilkins shall not operate to the disadvantage of him, Curtis. This point has been argued with ability and ingenuity. Many authorities have been cited for the purpose of sustaining the position assumed. I feel no disposition to question the force of these authorities, but the difficulty is that they do not, in my apprehension, apply to the case under consideration. In order to ascertain the strength of

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this argument, let us for a few moments examine as to the relative situation of these parties, and inquire whether Curtis appears before the court in a more favorable point of view than Wilkins. He claims to be, and is, an assignee, not the assignee of Cisna, but 437] of Wilkins. \*The contract for the purchase and sale of the land was entered into by Cisna and Wilkins. When this contract was reduced to writing, partial payments were made by Cisna to Wilkins, and it was agreed that at a subsequent period the land should be conveyed, a further payment made, and other acts performed. Both parties made efforts for the performance of this contract, but whether it were in fact performed by either is not now the subject of inquiry. Previous to the commencement of any suit, and but shortly after the contract was made, Wilkins assigned to Silliman and Curtis his interest in the contract, conveyed to them the land, and at the same time took from them an obligation to indemnify him against any claim on the part of Cisna. This assignment was made without the assent of Cisna, the assignees having full knowledge of all the facts connected with the whole transaction. Subsequently Silliman transferred his interest to Curtis. Thus Curtis, by his own act, became interested in the business, and, as far as he could, voluntarily placed himself in the situation of Wilkins. By these transactions the rights of Cisna could not, it is believed, be affected.

It will not be denied, I presume, that had Cisna, on his part, complied with the contract, he might have applied to a court of chancery to enforce a specific performance by the other contracting party; or he might have resorted, at his election, to a court of law for the recovery of damages for the non-performance by his adversary. Or if the contract was abandoned, he might recover back the amount which he had paid. If he elected to proceed at law, he must, from necessity, proceed against Wilkins. Curtis was no party to the contract, and at law Cisna would have no claim against him. But were we to adopt the principle contended for by the complainants, Cisna, by the joint act of Curtis and Wilkins, would be deprived of his legal right; he could not avail himself of the remedy at law, but would be driven to chancery; a doctrine from which such consequences would result can not be sanctioned.

The complainants urge that Curtis had no day in court; but can this be said with propriety? True, he was not a party upon

the record, but from the bill it appears that he was in fact and in truth the party in interest. He had undertaken \*to indemnify Wilkins against any claim which might be brought against him by Cisna. When the action at law was commenced, he appeared, as is proven by the testimony, and managed the defense until final judgment, and it is presumed that he will not complain that his rights were sacrificed in consequence of any misconduct or neglect on the part of his assignor.

Upon the whole, I am of opinion that, inasmuch as the subject matter of this controversy has been settled by the adjudication of a court of competent jurisdiction; was acquiesced in for two years; and inasmuch as the assignee, under the circumstances of this case, does not come before the court under circumstances any more favorable than those of the assignor, therefore the bill of the complainants must be dismissed with costs.

Judge PEASE concurred.

Judge SHERMAN, having been of counsel, did not sit in this cause.

Judge BURNET's dissenting opinion:

In stating the reasons why I can not concur in the opinion of the court, in this case, it will be necessary to examine:

1. The consequences of the non-performance of the contract on the 1st of September.
2. The effects of the assignment to the complainant Curtis.
3. The operation of the judgment at law on the rights of the parties to the present suit.

1. The covenants in this contract are simultaneous. The deed was to be executed and delivered to Cisna on or before the 1st of September, upon his then paying the first installment, and securing the residue by bond and mortgage. Neither party could charge the other with a breach, so as to sustain an action at law, till he had tendered a performance, for till then they were in *pari delicto*. If a man gives credit and relies on his remedy, he is left to that remedy; but in this case no credit was given. The vendor was not to part with the title, nor the vendee with the money, till each was secured. In *Jones v. Berkly*, and *Hotham v. The East India Company*, Doug. 665, and 1 Term, 633, Lord Mansfield decides that the dependence or independence of covenants must be col-



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lected from the evident sense and meaning of the parties, and 439] that however transposed they \*may be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. Every person will decide from the first reading of this contract that neither party intended to trust the other, or to render himself liable to perform in consideration of his remedy, on the contract, but in consideration of an actual performance by the other party. Wilkins engaged to deliver the deed to Cisna, on the 1st of September, upon his then paying, etc. It is not pretended that either party tendered a performance on that day, or that Cisna, on any subsequent day, offered to perform, or was ready or willing to perform, or that he made any attempt, either to execute or disaffirm the contract, prior to the tender of the deed by Wilkins. It seems that Wilkins, on the 1st of September, was at Mount Vernon, where the contract was made and deposited for safe keeping, and where he understood the parties were to meet for the purpose of performing it, and he avers that he was then ready to execute the deed. Cisna not attending, Wilkins executed a deed at Mount Vernon, seven days thereafter, and had it tendered to Cisna, at his residence, in Lancaster. During the succeeding winter a second tender was made of the deed, and after the assignment an offer was made by the assignees to perform the contract on the part of Wilkins. On these facts the question arises whether this contract has been forfeited by any laches of Wilkins, so as to bar him or his assignees from a specific performance. Admitting that Cisna was under no obligation to attend on the 1st of September at Mount Vernon, where the contract, which consisted of but one part, was deposited, and where the land, of which delivery was to be made, was situate, and that the understanding of Wilkins, on that point, was incorrect, it would by no means follow that there has been that kind of laches that ought to induce a court of equity to refuse their aid. Time is not usually considered as being of the essence of contracts, though it may be made so by the stipulation of the parties. Equity will relieve in cases of forfeiture, when compensation can be made, and the default is only in time; and the books abound in cases where chancery has enforced agreements, although the plaintiff had failed to perform on the day fixed on in the contract. It will not be contended by me that 440] time is of no moment, \*and that men may fulfill their en-

gagements when they please. Such a principle would be fraught with mischief. It would introduce that kind of negligence and disregard of obligations that would be as inconvenient to the business of society as it would be injurious to public morals. The modern rule on this subject seems to be, that a party who has not performed his undertaking, on the day appointed, may nevertheless claim the aid of a court of chancery, if he can show a reasonable excuse for his omission; or if the opposite party has acquiesced in the delay, unless there has been such a change of circumstances as would render a specific performance manifestly inequitable. In the case of *Vernon v. Stephens*, 2 P. W. 66, the complainant, the purchaser, had not paid the money on the day stipulated, yet he obtained a decree, the chancellor observing that if the defendant got his money, interest, and cost, he would have no reason to complain; that lapse of time in payment might be compensated with interest and cost; that in cases where there has been no acquiescence by the defendant, nor any specific apology offered by the complainant, courts have decreed a performance on the ground that there had been no unnecessary delay practiced by the plaintiff. It is also said the title to an estate requires so much clearing and inquiry, that unless substantial objections appear, not only as to time, but as to an alteration of circumstances affecting the value of the thing, or such as arise from the conduct of the parties themselves during the time, the objection can not be sustained. *Newland, Covenant*, 235.

In the case of *Langford v. Pitt*, 2 P. W. 629, the complainant not only had not tendered a conveyance on the day stipulated, but had it not in his power to do so, by defect of title. The master of the rolls decided, that it was sufficient if the party contracting to sell had a good title at the time of the decree, and in the case of *Stourton v. Meers*, cited in the last case, it appeared that the complainant, the vendor, had not a perfect title at the time of the articles, or even at the time of the decree, and the court granted him further time. The title was afterward perfected, and the defendant decreed to be the purchaser. In the case of *Wynn v. Morgan*, 7 Ves. 202, it was held, that as no unnecessary delay was imputable to the complainant, a specific performance ought not to be refused, because he had not a good title at the \*time of the [441 contract, or even at the filing of the bill, and the title having been perfected, the court decreed a specific performance. It was de-

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cided in the cases of *Williams v. Thompson*, and *Gregson v. Riddle*, referred to in *Newland*, 238, that even though a clause be inserted in an agreement, declaring it void, if the stipulation as to time be not complied with, still equity will not consider the performance at the day an essential part of the contract. In the latter case, Lord Thurlow said, "It has been often attempted to get rid of an agreement on this ground, but never with success. The most that has ever been made of the circumstance of an agreement, not being carried into execution at the time agreed on is, it has been held to be evidence of the waiver of the agreement, but has never been held to make the agreement void." It is not to be inferred, however, from these cases, that time, in a contract, is wholly immaterial, and that parties may trifle with their agreements on a calculation that they may perform them as may be most convenient to themselves. If delay takes place, some satisfactory reason must be given for it, or it will be considered as a waiver of the bargain. There is a great diversity in the causes that give rise to delay in the performance of contracts, and each case must depend, more or less, on its own circumstances; but it is believed no case can be found, in which equity has considered the day wholly immaterial. *Newland*, in his treatise, 242, states the rule to be, that when a party who applies for a specific performance of a contract, has omitted to execute his part of it, for a considerable time after the day appointed for that purpose, without being able to assign sufficient reasons to justify, or excuse his delay, the court will not compel a specific performance, and the reason given is, that the court consider his conduct as evidence of an abandonment of the agreement. The equity of this rule has been extended to contracts, in which no day was specified, where the complainant had consumed much time unnecessarily, and a material alteration had taken place in the value of the property. *Guest v. Homfray*, 5 Ves. 818. In that case, the master of the rolls observed, that if the plaintiff stands acquitted of the charge of practicing unnecessary delay, in making out his title, the court will not refuse him a specific performance, because he afterward 442] \*suffers a period of time to elapse before he files his bill. The opinion of Chancellor Kent, in *Benedict v. Lynch*, does not clash with the principle here stated. It will be found, on examination, that there is no similarity between the facts of that case and those which exist in this. *Benedict* had not merely neglected

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a performance for a few days, but for several years. The contract contained an express stipulation, that if the plaintiff failed, in either of his payments, the agreement was to be void. The plaintiff had admitted his inability to perform, and had agreed that if defendant would permit him to remain on the premises, one year, he would then give up the possession. He was not only guilty of gross negligence, but the facts of the case amounted to an actual abandonment. Here the contract was to be performed by both parties, on the 1st September. The land was contiguous to Mount Vernon, where the contract was made and deposited. The complainant understood the parties were to meet at that place, to execute the contract, and attended on the day, as he avers, ready to do so. The defendant did not attend. Seven days afterward the complainant executed a deed, which was tendered to defendant at his residence, and afterward at Mount Vernon. These facts show that the delay of the tender was neither unreasonable nor unaccounted for, and every presumption of an abandonment is excluded. I therefore conclude that the objection as to the time of the tender can not be sustained.

2. The second inquiry is, how far the rights of the parties have been affected by the assignment to Curtis.

It appears from the bill and exhibits, that on the first of February, 1817, which was several months after the deed had been executed and tendered to Cisna, and after his refusal to perform the contract, Wilkins, being pressed for money, was under the necessity of selling his interest in the contract, and did sell and assign it to Silliman and Curtis, authorizing them to make use of his name in any suit that might be thought necessary; at the same time the deed executed and tendered to Cisna was delivered to them, with authority to deliver it to Cisna, should any compromise take place. Silliman afterward sold and assigned all his interest in the contract to Curtis, for whose benefit \*the [443 suit is prosecuted. These are the material facts in relation to the assignment.

On the part of the defendant, it was contended that by this assignment Wilkins put it out of his power to perform his covenant, and that the defendant could not be required to accept a conveyance from an assignee.

It is not easy to perceive the force of this objection; Wilkins had a right to sell his interest in the contract, provided he did it

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so as not to prejudice the rights of the defendant. This appears to be the fact, as it is one of the stipulations of the agreement, that the deed first executed and tendered to Cisna should be put into the hands of the assignees, with power to deliver it to Cisna on his performing the original agreement. There was no necessity, therefore, of a conveyance from the assignee to the defendant. The title offered is from Wilkins himself. The object of the assignment was not to vest the title in the assignee, but the money due on the contract with Cisna; and with that view the deed executed on the 7th of February was delivered, in the form of an escrow, to be delivered over to Cisna on his complying with the contract. A deed generally takes effect from the delivery, but this rule is departed from, and the doctrine of relation is resorted to, when it becomes necessary to prevent fraud, or give effect to the intention of the parties, if third persons are not injured.

A deed delivered as an escrow usually takes effect from the performance of the condition and the actual delivery to the grantee, but the fiction is always resorted to, and the deed considered as taking effect from its execution, when justice requires it.

In the case of *Butler and Baker*, 3 Co. 35, it was decided that a deed delivered to a third person, as an escrow, and afterward delivered to the grantee, should relate back, and take effect from the first delivery, for the purpose of giving effect to the deed; as if a *feme sole*, having made a deed, should marry after the conditional delivery, and before the delivery to the grantee; or if a grantor, whether *feme sole* or not, should die between the first and second delivery. In these cases, the deed would relate back to the first 444] delivery. This is done to prevent injury, and to uphold the deed, or in the language of Coke, "from necessity *ut res magis valeat quam pereat*. To this intent, by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not his deed till the second delivery." In the case of the lessee of *Woolams v. Clapham*, 1 Term, 600, it was held, that the title of the surrenderee, after admittance, was perfect, as from the time of the surrender, and should relate back to it. That is, although the title, in strictness of law, is not complete till the admittance, the title shall relate back, and take effect from the time of the surrender.

So in the case of *Hermitage v. Thompkins*, 1 Lord Raym. 729, it was ruled, that if a man demises lands by indenture, in which he has no interest, and afterward buys them, he will be estopped,

unless the want of title appears in the recitals of the lease. In that case, the fiction carried back the grant to the lessor to a period antecedent to its date, to give effect to the lease made at a time when the lessor had no pretense of title. In the case before us, the deed to Cisna was executed on the 7th September, and tendered shortly after, and on the first of February following, when the contract was assigned, it was delivered to Curtis, the assignee, as an escrow for the use of Cisna, and is now brought into court for that purpose; and, if accepted, must relate back to the first delivery, or, if necessary, to its date. Curtis, by the terms of the assignment, was made the instrument for passing the title direct from Wilkins to Cisna. He disavows all claim of title in himself, and produces the deed, praying for such a decree as will make it operative, to vest the title in Cisna. There is, therefore, no ground for the objection, that the title must pass through a third person; but if such an inconvenience could result from the assignment, the decree can be so framed as to guard against it. Had Curtis purchased for the avowed purpose of overreaching the right of Cisna, he would have been a fraudulent purchaser, as he had notice of the contract, and he would have held the title subject to the equity of Cisna.

The deed of the 7th September, as we have seen, was delivered to Curtis as an escrow, and it was not the intention of the parties that the title should vest in him, unless that deed should become inoperative by a failure on the part of \*Cisna; as Wilkins [445 had a right to assign his interest, this court ought to protect it in the hands of his assignee. But it can not be necessary to pursue this subject further. The case of *Hashbolt v. Porter*, 2 Pow. 138, seems to establish the principle, that an assignee, not being a party to a suit against his assignor, is not bound by the decree rendered, but may go into the whole merits, in a subsequent suit, in which he is a party.

3. The next inquiry is, whether the judgment at law can operate as a bar to the decree prayed for by the bill. It appears by the exhibits, that after the assignment, the tender, and the death of Cisna, his administrator commenced an action of assumpsit against Wilkins, for the purpose of recovering from him the value of the sheep delivered on the contract. The declaration contained but one count, charging that defendant was indebted to Cisna, in his life, in the sum of \$6,000, as well for divers goods sold and de-

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livered, as for one hundred sheep sold and delivered by the said Thomas to the said Francis, and also for money by the said Francis before that time had and received to the use of the said Thomas. The defendant pleaded the general issue, on which there was a verdict and judgment for the plaintiff. It is contended that this judgment is final, and that it must restrain the court from investigating and deciding the merits of the case now before them, on the ground, that when a court of law has competent jurisdiction, and can give full relief, its decision is final. Without attempting to controvert this principle, I will observe that it does not and can not apply to this case, because the parties are different—the subject matter is entirely different, and the court that rendered the judgment had no jurisdiction of the case now presented, nor had they power to grant the relief prayed for in this bill. The bill presents a contract for the sale of real estate, involving the rights of an assignee, and the various questions growing out of a non-performance on the day stipulated, and it prays for the specific execution of the contract. To claim for the court that rendered the judgment a power to hear and decide these matters, and to grant the relief prayed for, would be neither more nor less than to 446] convert it into a court of chancery, and vest it \*with all the powers that distinguish such a court from a court of common law.

1. The parties are not the same. This bill is filed exclusively for the benefit of Curtis. The suit at law was against Wilkins alone; Curtis was not a party, and therefore was not and could not have been heard, nor was it in his power to compel Wilkins to defend the suit. It is true that courts of law will protect the rights of assignees as far as their forms of proceeding will permit, but these fall far short of what was necessary for the security of this assignee, had his claim been before the court. To conclude a person by a decision at law, he ought to have a day in court, and an opportunity of being heard. As to the complainant, Curtis, this has not been the case; he is now heard for the first time, and for the first time his claims are presented for examination. By the rules of common law, a record can not be received as evidence, unless it be between the same parties, and involve the same point. Hence the record of a conviction for an assault and battery can not be given in evidence in an action for damages against the same defendant for the same assault and battery.

2. The subject matter of the suits is not the same, nor is the object the same. The suit at law, we have seen, was an action of assumpst, founded on a sale of goods and sheep, and the object was to recover the value of those goods and sheep. The subject matter of the bill is a contract for the conveyance of real estate, and the object of it is a specific performance of that contract. I am aware that the sheep had been delivered as a payment on the contract, but that circumstance can not affect the case. We have seen that the contract had neither been forfeited nor abandoned by Wilkins; that it was not the ground of the action, nor necessarily nor directly before the court; nor was there anything in the record having a perceptible allusion to it. But the bill in chancery is founded directly on the contract. It brings before the court every circumstance connected with it, and the right of the complainant to enforce it. In the one case, the court decided on the right of Cisna to recover from Wilkins the value of certain sheep delivered on a contract; in the other, they are called upon to decide, whether Curtis is not entitled to the specific performance of \*that con- [447 tract. The subject matter, and the object of the first suit, was within the jurisdiction of the court that decided it; but neither the subject matter, nor the object of the present suit, was within their jurisdiction, nor could they have granted the relief here prayed for.

The fact that the representatives of Cisna have recovered a judgment for a sum of money, does not destroy the power of a court of chancery to investigate the equity of that judgment. This may be done without calling in question its correctness, in reference to the premises on which it was rendered. It frequently happens that such judgments are obtained because the only ground on which they could be resisted is not within the reach of a court of law. Whatever might have been the ground on which the judgment in favor of Cisna was had, it would appear to be sufficient to sustain the jurisdiction of this court, and the right of the plaintiff to the relief he seeks, that he has made and supported a case that entitles him to a decree for a specific performance, and that that decree can not be rendered without enjoining the judgment at law. It might be inferred from the arguments of counsel, that it was considered by the court that rendered the judgment that the tender of a deed was a condition precedent; that Wilkins, having failed to tender on the 1st of September, could not avail himself of a



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subsequent tender in a court of law. If this were the case, and there appears to be no other ground on which a recovery on such facts as are now before us could have been had, it must put the question at rest, as it presupposes a want of power in the court that rendered the judgment to grant the defendant that relief which a court of equity is in the daily habit of granting, nor can it affect the question to concede, that the court restricted their own powers unnecessarily. If, as a court of law, they held the defendant, Wilkins, strictly to a tender on the day named in the contract, it must have been from an actual or supposed want of that power which this court clearly possesses; and in either case the merits of this complainant have not been heard or decided. It is a question that has been much litigated, how far a court of chancery can relieve a person against the consequences of an omission to perform his contract on the day stipulated. It is not therefore surprising, that a court of law, viewing these covenants as it is understood 448] \*they did, should have decided against hearing the only defense, on which a recovery could be resisted. The restriction imposed by that court, on its own jurisdiction, has compelled a resort to chancery, and it does not become us to say they have erred in deciding the limits of their own power.

It is admitted that the merits of a judgment can never be overhauled, in an original action, either at law or in equity. Such judgments are conclusive till reversed, or set aside, by a competent revising power; and I wish it distinctly understood, that no attempt is made to sustain this bill on the ground of supposed error in the court of law. It is to be taken for granted that that court decided correctly, and that we, with the same case, and exercising the same extent of power, would have decided in the same way.

Disclaiming all right to examine the correctness of the judgment at law, the ground upon which I would sustain this bill is, that the relief it prays for could not be granted by the court at law, and that in consequence of rejecting the evidence, and with it the defense of Wilkins, on the supposition of a want of jurisdiction to hear and decide it, a judgment has been obtained against him, which, in equity and good conscience, ought not to be enforced. Viewed in this light, the case seems to be stripped of all difficulty, and to be placed on the ground on which chancery usually relieves against judgments at law. The case of *Moses and Macferlan* went

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further than is necessary, to support this bill. There an action at law was sustained, to recover back a sum of money, paid on the judgment of an inferior court, because that court had rejected the defense set up as not being within their jurisdiction. Here the same ground exists, and in addition to that circumstance the whole object of the bill is without the jurisdiction of a court of law, and no part of the case could have been examined by them with a reference to the decision now prayed for.

Inasmuch, then, as the parties, the subject matter, and the object of the suits are different; as the one now before us calls for the exercise of powers not possessed by a court of law, and as Curtis is an assignee, and was not a party to a former suit, I must believe, that the judgment is not a bar to the present suit, and that the plaintiff is entitled to the relief he prays for.

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*Relief in Equity.*

Contracts made in good faith can not be rescinded in equity where both parties were mistaken as to value.

THIS case came up from Greene county. The object of the bill was to obtain relief against a judgment at law on certain sealed notes made in 1816.

The bill charged that on the 2d of May, 1816, J. Hunter agreed to purchase of Ekellis Willhite five lots in the town of Pittsburg, in the then territory of Indiana. That Willhite represented that he, with David Hillis and John Minor, were proprietors of the town, which was represented to be in a flourishing condition, and likely to become a seat of justice. That for the purchase money, he gave five notes payable in September following, for \$355; three made payable to Ekellis Willhite, and two to his son, John H. Willhite. At the same time he received Ekellis Willhite five title bonds in the following terms:

“We, Ekellis Willhite, John Minor, and David Hillis, obligate

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ourselves and our heirs, to deed to John Hunter one in-lot in the town of Pittsburg, Indiana Territory, as known on the plan of said town, as of record, by the No. 47, for lot aforesaid; for the performance of which obligation we jointly and severally bind ourselves under the penal sum of \$2,000, current money of the United States. Given under our hands and seals, this 2d day of May, 1816.

“EKELLIS WILLHITE, [Seal.]

JOHN MINOR, [Seal.]

DAVID HILLIS, [Seal.]”

This contract was executed for all the parties by Willhite, who represented that he was authorized to do so by Minor and Hillis.

The bill further charges that Willhite's representations in relation to the town were false. That he had no power from Minor and Hillis to sell or to bind them in a bond; that the land on which the town was laid out was not secured, being only entered and one payment made to the government; that Thomas Hunter was not an original party to the contract, but executed the notes as security, after they became due, without any consideration; that after the notes became due they were assigned for a trifling consideration, and came to the hands of the Goudys by assignment, 450] \*dated in February, 1818, by whom judgment had been obtained against Thomas Goudy alone for the full amount of the notes. The bill prays an injunction and a rescission of the contract.

The answers admit the contracts, assignments, and judgment, as stated in the bill; but they deny the allegations of fraud and misrepresentation. Willhite asserts that Minor and Hillis were equally interested with him, and that he had power from them to sell and execute bonds; that they had a title to the lands which had not been forfeited, but was now secure; that John Hunter saw the town before he purchased, and that no misrepresentations were made.

The testimony on the part of the complainants proves that the town of Pittsburg is entirely abandoned as a town; that Willhite has inclosed the whole site as a farm, and has it under cultivation. It is also proved that Willhite had made but one payment on the land in 1816. But that the whole was paid before the time of hearing this cause, and Willhite entitled to a final certificate.

On the part of the defendants, it was proved that Minor and

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Hillis were understood to be part proprietors of the town, and one witness testifies that he understood from them that they had authorized Willhite to sell lots. It was also proved that Minor and Hillis were men in good circumstances, sufficient to be responsible for the title to the land. And it was in proof that Hunter expressed himself well pleased with the bargain.

A deed for the lots from Willhite, Minor, and Hillis, duly executed and acknowledged, dated 12th March, 1823, was made an exhibit in the case.

COLLET, for complainant; ALEXANDER, for defendant.

By the COURT:

The misrepresentation charged in the bill is not made out in proof, although it is plain that the complainants have made a hard and losing bargain. The lots appear to have been purchased upon speculation under the impression that a town would grow up and property be valuable. The purchaser was on the ground and could judge for himself. He seems to have had the same opportunity to form a correct opinion that was possessed by the other party. A court of equity never interferes to relieve against a con- [451] tract, made in good faith, where both parties are mistaken as to the value. Had any circumstance given a great and sudden rise to lots in this town, the proprietors could not have asked equity to give them a new bargain against Hunter by increasing the price he was to pay. It was an equal risk, and equity can not interpose.

By procuring Thomas Hunter to execute the notes as security after they became due, John Hunter then affirmed the contract, and acknowledged its continued obligation, although not performed by the other party making a conveyance. To make the state of the title a ground for rescinding the contract, the purchasers should have tendered payment of the purchase money and demanded a title; or if the tender was not necessary in this case, he should have claimed his deed, or have taken some steps avowing an intention to give up the bargain. He has not shown that he was ignorant of the state of the title when he purchased, and we are not to presume it.

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Judge BURNET's dissenting opinion :

I will state, as concisely as practicable, the reasons which have induced me to dissent from the opinion of the court in this case.

1. The notes, or sealed bills, having been assigned long after they were due, are subject to the same equity in the hands of the assignee, as if they had remained in the hands of the original payee.

2. From the terms of the contract, the delivery of the deed, and the payment of the money, were, to say the least, simultaneous acts, and the vendor had no right to demand the money till he had offered the deed.

3. There was a suppression of the truth by Willhite.

4. There was also a suggestion of falsehood.

5. The disparity between the value of the lots and the price to be paid is so enormous that it would, under the circumstances of the case, be inequitable to hold the purchaser to his bargain.

6. The object of the purchase has failed in consequence of the improper conduct of the vendor.

7. There has been gross laches on the part of Willhite. He has 452] trifled with his contract till the circumstances of \*the parties and the value of the property are materially changed.

1. It is unnecessary to discuss the first ground, as the fact appears from the bill and answer, and the legal consequence is not denied.

2. By the tenor of the bonds, Hunter was entitled to a deed on demand. The notes were payable at a future day. It must, therefore, have been the understanding of the parties that the conveyance was to precede the payment of the money, or at least to accompany it; and if the whole contract had been embraced in one instrument, the conveyance would have been a condition precedent, and the tender of a deed must have preceded the commencement of a suit. The circumstances that obligations were given for the purchase money, distinct from the title bonds, ought not, in a court of equity, to affect the construction of the contract, which should be considered as an entire transaction, in order to give effect to the manifest intention of the parties. There is nothing disclosed in the case from which an inference can be drawn that Hunter intended to rely on the faith of Willhite, or to part from his money before he received his title. In latter years

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courts of law, as well as courts of equity, have strongly inclined to consider the stipulations of contracts as dependent, and when a fair interpretation of the whole transaction would warrant it, they have so declared them. The principle is both just and equitable. While its tendency is to secure both parties, it does injustice to neither. Men may contract as they will; they may give credit at pleasure, but here no such intention appears. The situation of the property, at the time of the contract, was such that Hunter could not safely have parted with his money. Only a small part of the purchase money had been paid to government, and by the terms of their sale the entire tract might have been forfeited for the non-payment of the residue. It was prudent, therefore, on his part to make his contract so as to guard against that danger. In the case of *Hutchinson v. McNutt*, 1 Ohio, 14, this doctrine was recognized.

3. It was the duty of Willhite to communicate to Hunter the real situation of the title, and the time when it would be in his power to execute the deed. But it is not pretended by the defendants that this information was given, and \*the only in- [453]ference that can be drawn from the bill, answer, and exhibits is, that the deed was expected when the notes became due, and that Hunter had no reason to doubt of its being then executed. Every person, when he enters into a contract, has an object in view, to attain which punctuality is necessary; if that be wanting, his arrangements, predicated on the contract, may be frustrated. This applies to every contract, and imposes it as a duty on a vendor to disclose the nature of his title. Such a disclosure was not made in this case, and the consequences of suppressing the truth are very apparent. Had the vendor been informed that the purchase money had not been paid to government; that the land was subject to be forfeited, and that the title would not be perfected for more than six years, he might have made his calculations accordingly, and would most certainly have declined the contract. We find, on the part of the defendants, a disposition, even at this time, to cover the gross negligence which has occurred in the completion of the title. This appears from the silence of the answers on this point, and the caution manifested in taking the deposition of the register of the land office. No question was proposed to him tending to disclose the time of paying the money, or of assigning the certificate to Willhite, nor was he required to annex

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to his deposition copies of the receipt and assignment filed in his office, or of the final certificate issued thereon, although he was required partially to testify of their contents.

4. Willhite affirmed that Minor and Hillis were joint proprietors in the town, and that he was legally empowered by them to sell and to affix their names and seals to the title bonds, and although this authority is expressly denied in the bill, no power of attorney is produced or proved. An attempt, however, is made to remedy this defect of power, by procuring them to join in executing a deed nearly seven years after the vendee had a right to demand his title. Although the defendant, Willhite, attempted to bind his co-proprietors, and to render them liable to an action, should there be a failure of title; yet it appears they were not to participate in the fruits of the contract, as their names were erased from the notes after they were drawn, by which three of them were made payable 454] to Willhite himself, \*and the other two to his son. This circumstance shows, that Willhite was acting for his own individual benefit. If it be asked why Hillis and Minor joined in the deed, the answer is at hand. Hillis had previously assigned all his interest in the land to Willhite—Minor sets up no claim to any part of it—the patent had just been procured in the name of Willhite—the title was perfect—they run no risk, therefore, by joining in the deed. They appear to be friends of Willhite, and disposed to aid him as far as it can be done without risk or loss to themselves; but I discover no admission of a liability on their part, or any disposition to interfere till Willhite had possessed himself of the entire interest and title in the land, by some arrangement, not disclosed, with his co-proprietors and the assignee of the notes. Then we find their signature, to the deed as mere matter of form. I use this expression because they had no interest in the land, either equitable or legal. Had this arrangement been made in time, it would not have rested with Hunter to object; he would have had the benefit of his contract, and could not have complained; but as the defects of the title were not disclosed at the time of the contract, nor remedied within any reasonable time thereafter, it has operated as a fraud on Hunter, which ought to release him from the obligation of the contract.

5. The great disparity between the value of the lots, and the sum stipulated to be paid, is also a circumstance worthy of notice. I am aware that this consideration, of itself, has been held not suf-

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ficient to set aside a contract, though it might induce a chancellor to refuse a decree for a specific performance; but when this disparity is connected with the other facts of the case, it will be entitled to great weight. Whatever might have been the supposed value of the lots at the time of the contract, in the estimation of a person ignorant of the defect of title, or whatever might have been the real value at that time, if the vendor had been possessed of a legal title, in which the community could have confided, it is very apparent that at the time the title was perfected, and Willhite was enabled to fulfill his contract, they were of no more value than an equal quantity of wild land of the same quality, in any part of the neighborhood. As this state of things is to be ascribed to the failure and abandonment of the town, which has resulted [455 from the conduct of Willhite, it is proper to consider the present value of the lots as the consideration of the notes. If this be correct, the court requires Hunter to receive a property worth four or five dollars, and to pay for it a sum exceeding five hundred dollars. It was not in the power of Willhite to perform his contract till the prospect of a town was lost sight of, and the lots reduced, in the public estimation, to their present value; it is, therefore, just to consider that value as the consideration to whatever cause its diminution may be ascribed; for until the title was perfected, the purchaser could not safely improve or dispose of the property, or apply it to any valuable use. Under such circumstances, to compel him to pay at the rate of a hundred for one, seems to be inconsistent with equity, and the common dictates of justice. The disparity is so enormous as to shock the mind, and impress it at once with a conviction of fraud.

6. The object which might have induced Hunter to make the purchase has wholly failed, and this is to be attributed to the conduct of Willhite, in neglecting to perfect his title, and in converting the site of the town into a farm. The former circumstance would create such doubt and suspicion, as would deter adventurers from risking their money, by purchasing and improving in the town, and the latter was a virtual withdrawal of the lots from the market. It must have diverted the attention of the public from the place, and they must have ceased to consider it as a town. This conduct, having removed every inducement to the purchase and improvement of lots, until after the season for establishing a town had entirely passed by, has rendered it impossible for



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Hunter to use the lots for the purpose intended. His object, therefore, has been lost. The consideration moving him to the purchase has failed, and that failure appears, in no degree, to be ascribable to himself. The proprietors, having laid out their town, and induced the complainant to purchase, were under a moral obligation to use reasonable diligence to advance its prosperity. Purchasers would naturally rely, and had a right to rely on such efforts, and the withholding of them, was a breach of an implied undertaking, injurious to those who might have previously purchased. But in 456] this case, Willhite is not only \*chargeable with an omission of duty, but with acts directly calculated to destroy the town, or rather to prevent it from coming into existence, for it does not appear that it ever has existed, otherwise than on paper. It appears, from the testimony, that Hunter immediately after his purchase, engaged men to improve his lots; that he intended to settle on them, and commence a business that could be carried on with advantage only in a town, but discovering that the title was doubtful, and the fate of the town thereby uncertain, and that no efforts were making to advance it, he could not proceed with safety, and the event has proved that his apprehensions were well founded.

7. Willhite has been guilty of gross laches, as will appear by reference to dates. The contract was made in May, 1816. The notes became payable in September following, when, if not before, Willhite was bound to convey the lots. The payment to government for the quarter section, on which the lots are situate, was not made until October, 1821. The last payment to government became due in August, 1819. In August, 1820, the land became liable to forfeiture, and was saved by the act of Congress, 1821. The deed to Hunter was not executed until March, 1823, more than six years after the time it should have been made, by the terms of the contract. These laches have not been acquiesced in, nor are they satisfactorily accounted for. In the meantime, the situation of the parties, and of the property, is materially changed. The contemplated town is converted into a farm. The purchaser, unable to procure a title, has abandoned the object, and has settled himself in the State of Ohio. The value of the lots has been reduced to the legal price of government land, and when separated from the farm of Willhite, of which they seem to form a part, are in reality of no value. Under such circumstances, it appears

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to me that the complainant ought to be relieved from the contract.

The facts disclosed in the case do not appear to establish the grounds on which the opinion of the court is predicated. The lots were purchased by complainant for his own use. It was his intention to improve and settle on them, not to speculate, by selling them at an advanced price. Nor do I discover anything [457 in the pleadings, or testimony, that will justify the inference that Hunter had the same opportunity to form a correct opinion that was possessed by the other party.

Willhite knew the standing of his title—the money due on the land to the government, and his ability and arrangements to complete the payment. He does not pretend that he disclosed these facts to Hunter, nor is there any evidence to show that Hunter had reason to suspect that the purchase money had not been paid to government, or that Willhite's title was not complete.

If this contract had been made in good faith, both parties being ignorant of the value, the case would have presented itself to my mind in a different aspect, but it appears to me, that on the part of Willhite, the contract was made, *mala fide*, and that the depreciation of value has arisen from the want of title, not disclosed, but since discovered, and from the conduct of Willhite himself, subsequent to the contract, of which Hunter could have no knowledge. Equity does not usually require anything to be done *pro forma*, when the doing of it would be vain and useless. The complainant had discovered that Willhite had no title, and that he could not execute a deed. It was altogether uncertain whether he would ever acquire a title. It was therefore natural for Hunter to draw the conclusion, that in the estimation of both parties the contract was at an end. Under such circumstances, to require a formal tender of the purchase money, or a demand of a deed, to put the vendor in the wrong, seems to be, to say the least of it, *herens in cortice*.

It is true that the complainant has not expressly proved a negative, as to his want of knowledge of the state of the title, but he has solemnly averred it under oath in his bill, and the defendants have not attempted to deny it in their answers, or to disprove it by testimony. I can not, therefore, concur in the opinion expressed by the court.

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\*GREEN ARNOLD v. FULLER'S HEIRS.

*Sci. fa.—Supersedeas—Levy—Satisfaction.*

Levy of execution upon real estate is not vacated by writ of error and supersedeas.

Quashing *vend.* and setting aside valuation does not affect a levy.

When *fi. fa.* is returned levied upon land, another *fi. fa.*, issued before the first levy is disposed of, is void.

Distinction between void and voidable

*Sci. fa.* to vacate satisfaction improperly entered on judgment or execution.

THIS was a *scire facias*, brought before the supreme court in Gallia county, at the May term, 1824, by appeal from the common pleas. The facts of the case were these: At the August term, 1813, Samuel Green Arnold, obtained judgment against Sylvester Fuller, for \$468.95 damages, and cost of suit. On the 8th July, 1814, an execution issued to David Ridgeway, sheriff of Gallia, which was returned no goods. On the 28th October, 1814, an *alias fi. fa. et lev. fa.* issued to the same sheriff, who returned that he had levied on one hundred acres of land, being lot No. 730, of town one, range fifteen, Ohio Company's purchase; and that further proceedings were stayed by writ of error, afterward abated by the death of Fuller; the sheriff, Ridgeway, went out of office, and in February, 1818, a *vend. expro.* issued to his successor, which was returned, property not sold for want of bidders. On motion of the defendant's counsel, this writ was quashed and the appraisement of the property set aside by the court. On the 28th November, 1819, a new execution issued to J. Holcomb, then sheriff of Gallia county, on which he returned that he had levied on a hundred acre lot of land, No. 730, town one, range fifteen, Ohio Company's purchase, and had sold the same to David Putnam, plaintiff's attorney, for \$920. The receipt of the said Putnam was also returned with the following words: "\$628. April 13, 1819. Received of Samuel R. Holcomb, by land bid off on this execution, six hundred and twenty-eight dollars, for debt and interest on this execution."

The defendant, Fuller, died intestate, having previously conveyed the land to his son, one of the present defendants. The

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plaintiff avers, in his *scire facias*, that by reason of the premises, the sale was inoperative and void, and that his judgment still remains unsatisfied. The defendants are called upon to show cause why the proceedings, since the death of the defendant, Sylvester Fuller, should not be set aside, and the judgment satisfied of the lands and real estate of the said Fuller, deceased, and particularly of the said lot, No. 730.

The defendants demurred, and the plaintiff joined in demurrer.

\*KING, in support of the demurrer :

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1. A writ of *sci. fa.* does not lie in a case like the present, and to effect the objects prayed for.

A *sci. fa.* is a judicial writ founded on some matter of record, as a recognizance at common law, or by statute, judgment, letters patent, and the like, to enforce execution of them, or to vacate and set them aside. F. N. B. 267; 6 Bac. 102; 2 Saund. 70, note 4.

As it respects the first class, recognizances and judgments, its object is to enforce them; and in respect to the second class, letters patent, it is to vacate or set them aside. It is believed that in the English books, no case can be found where a *sci. fa.* has been permitted, to correct a train of irregularities committed by the party himself who sues the writ.

The cases from Connecticut, reported in Root & Day, are very questionable authority at best. They stand upon particular circumstances, and ought not to be taken as a rule, except in cases similarly situate.

It is urged that the errors in this case might have been corrected on motion, and the same may be done by *sci. fa.*

If this were admitted, which it is not, it would not affect the argument. After the length of time that has elapsed between the inception and consummation of these proceedings; and the period from their consummation to the suing out of this writ, the court would not interfere on motion to correct irregularities, but would leave the party to abide the consequence of his own negligence.

2. The original judgment, in this case, was rendered in a personal action, and at common law, no writ of *sci. fa.* lay to revive a judgment in a personal action, if a year and a day elapsed without suing execution. The plaintiff was driven to his original

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action of debt upon such judgment. 2 Inst. 469; 2 Salk. 600; 6 Bac. 104.

In personal actions, this writ was given by the statute, 2 West; 13 Ed. 1; which is not in force in this state. If we have a common law for framing judicial writs, it must be the same that existed in England before it was modified by statute, and we have no statute giving a writ of *sci. fa.* in a case like the present.

3. If in such case a writ of *sci. fa.* might issue under our laws, this writ is not properly conceived.

460] \*It is issued jointly against the purchaser, or *terre tenant*, and the heirs of the judgment debtor. It can not issue against the *terre tenant* until the heir is summoned, for he may show payment or a release. It can not issue against the *terre tenant* and heir until the personal representatives are summoned, or nihil returned: for they may show payment or a release. 6 Bac. 114; 2 Todd. Pr. 1032. This writ is, therefore, irregular.

The *sci. fa.* prays to set aside the *alias fi. fa.* levy, appraisement, and sale, and the entry of satisfaction, and calls upon the defendants to show cause why a *vendi.* should not issue on the levy made in the lifetime of Fuller. This can not be done.

Upon the allowance of the writ of error, a *supersedeas* direct issued, by which the levy was removed. The writ commands the person to whom it is addressed to forbear doing the act superseded, or if it be already done, to annul it as far as possible. F. N. B. 236; 6 Bac. 414.

If a writ of *hab. fac. pos.* issue irregularly and be executed, a *supersedeas* restores the possession. If goods be taken on a *fi. fa.* and before sale the debtor delivers to the sheriff a *supersedeas* upon writ of error, the goods are to be restored. If an officer detain a person in custody arrested upon a *ca. sa.* or *exigent*, after writ of *supersedeas* delivered to him, it is a trespass. 1 Vent. 30; Cro. Jas. 379; 1 Roll. 241.

Upon these principles the levy on the *fi. fa.* was vacated, upon the service of the *supersedeas*, in this case. No new execution can issue. The party's remedy is by action on the bond in error, or upon the judgment.

DOUGLASS, on the same side, maintained:

That the sale upon the last *fi. fa.* was good. Where a judgment creates a lien, an execution issued after the defendant's death is

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not void, and if not objected to at the return, can never after be questioned. 13 Johns. 550; 16 Johns. 576.

A *sci. fa.* against heirs is not absolutely necessary; a good title may vest in the purchaser without it. 4 Dall. 115; 2 Bin. 227; 8 Johns. 361.

Our statute under which the proceedings were had, did not require a *sci. fa.* against heirs, or *terre tenant*. This was first required by the statutes of 1822.

\*GRAINGER,† for the plaintiff:

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By the writs of error and supersedeas the power of the execution and judgment was suspended until the writ of error should be determined. But the levy was not thereby removed or affected. It remained in *statu quo*, as the writ of error found it. 5 Com. Dig. 294.

Upon the death of the defendant, Fuller, and consequent abatement of the writ of error, the supersedeas was terminated. The case stood as if no writ of error had been issued. But, by the death, an interest in the property levied on became vested in the heir.

The return of *nulla bona* on the original *fi. fa.* negatives the suggestion that there might be personal property which might render it proper to proceed against the personal representative. Besides the levy on the land remains in force, which being *pro tanto* a satisfaction, the personal representative could not be proceeded against.

The effect of a *sci. fa.* is not to obtain a new judgment; it only reanimates that, the vital power of which was suspended. It takes up the proceedings as they stood at the instant of the death, when the suspension took place, and gives the remedy against the property of the deceased, which, at the time, was liable to be affected by the judgment in whosever hands it may be. 2 Seld. 188.

Here this particular property, and this only, was liable to the

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†The late Ebenezer Grainger, of Zanesville. He died in September, 1822; but he had been retained by the plaintiff, and the argument, from which this abstract is made, was found, in an unfinished state, among his papers. It is, probably, all that the judicial history of the state can preserve of one of her most valuable and soundest lawyers.

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judgment; at all events, no other property could be touched until this was disposed of, and proved insufficient. And the interest in the property being by the death vested in the heir, or *terre tenant*, none other need or could be made parties to the *sci. fa.*

It is said in 2 Saund. 72, "that a *sci. fa.* must issue against the personal representative, and *nihil* be returned before it can go against the heir or *terre tenant*. Carthew is referred to as authority, where it is only given as argument of counsel; and as many authorities are cited against as for it. If in England the law is so settled, it would seem but matter of form. For where it is intended to go against the heir, or *terre tenant*, the practice is to put 462] the *sci. fa.* into \*the hands of the officer fifteen days before the return, with directions to return *nihil*, which is done without making any search whatever.

But in this case such proceedings must be unnecessary. Until the levy on the land is disposed of, no proceeding can be had except against the heir, or *terre tenant*. The personal representative has nothing to do with the matter.

The proceedings subsequent to the death of Fuller, though irregular and void as against all parties, yet having resulted in an entry of satisfaction, upon execution, must be removed before the plaintiff can proceed regularly upon his judgment. For this the writ of *sci. fa.* is a proper process. It is in the nature of a bill in equity, and the court will go into any inquiry calculated to elucidate the right and justice of the case. 6 Bac. 120.

In Langdon v. Langdon, 1 Root, 453, a *sci. fa.* issued for the very purpose of removing out of the way irregular proceedings upon execution, in consequence of which it was indorsed satisfied. In 4 Day, 222, there is also a case fully in point.

The case of Jackson v. Robins, 16 Johns. 576, was cited by one of the counsel to show that the sale under the last *fi. fa.* was good. But it by no means sustains that position. It decides that certain irregularities in a sheriff's sale, which rendered the sale voidable, but not void, should not be inquired into on ejectment against the purchaser thirty years after the sale. Here the sale is recent, and the process upon which it was made not merely irregular, but void; both because of the existing levy, and, if that was out of the way, because of the death of the defendant.

It is well settled, that where there is a single defendant, who

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dies after judgment and before execution, there must be a *sci. fa.* before execution can issue. 2 Saund. 6, n. 1; 2 Ld. Raym. 768; 2 Seld. 190; 4 Day, 226.

Opinion of the court, by Judge BURNET:

Several questions are presented in this case: 1. Did the writ of error and supersedeas avoid and vacate the execution and levy, so as to render it a nullity, or did it merely stay the proceedings of the sheriff. 2. If the latter, did the order of the court, quashing the *vend. expo.* and setting aside \*the appraisement, [463 affect the *lev. fa.* and the levy made thereon. 3. If the supersedeas merely stayed the proceedings, was the execution of November 28, 1818, and the sale made thereon, merely irregular, or altogether void, so as to entitle the plaintiff to the relief prayed for. 4. Can a *scire facias* be sustained in a case like the present.

As to the first point, no authority has been cited to show the effect of a supersedeas on an execution levied on real estate. It is said in the books, that the object of a supersedeas is to stay proceedings *till the errors are disposed of*. In the Bishop of Ossory's case, Cro. Jas. 534, it was resolved by all the court, that the writ of error was a supersedeas *till the error was examined, affirmed, or reversed*. In *Badger v. Lloyd*, 3 Salk. 145, it was said by Holt, Chief Justice, that although a writ of error forecloses the court, and ties up their hands, yet it doth not alter the right of the parties.

If a writ of error be allowed on the return day of a *ca. sa.*, the sheriff may, notwithstanding, return the writ *non est*, the plaintiff shall have the benefit of the return, and may afterward proceed against the bail. *Parkins v. Wilson*, 2 Ld. Raym. 1256. This could not be the case if the allowance rendered the execution a nullity. The same inference may be drawn from the reason given for quashing the writ in the case of *Smith v. Nicholson*, 2 Stra. 1186. A *ca. sa.* had been taken out on the 3d of December, for the purpose of proceeding against bail. On the next day a writ of error was allowed, after which the *ca. sa.* was returned *non est inventus*. After the writ of error was at an end, the plaintiff proceeded by *scire facias* against the bail. On motion the whole proceedings were set aside, because the return of *non est inventus* was obtained after notice of the writ of error, which, in its nature, stops all proceedings. The sheriff could not so much as look after



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the defendant, in order to ground such a return thereon. The reason is apparent; as the rule required the *ca. sa.* to remain four days in the sheriff's office before he was authorized to return a *non est inventus*, for the purpose of fixing the bail, and as the writ of error was allowed the next day after the *ca. sa.* issued, the operation of the *ca. sa.* was suspended before it was ripe for the return, 464] and while something remained to \*be done, which the allowance prohibited; but in the preceding case, the four days having elapsed before the allowance, the return was held to be good, and the bail was fixed. This could not have been the case if the writ of error had affected the *ca. sa.* so as to render void that which had been done before the allowance. In the one case, the execution being ripe for a return, before the supersedeas, the return was sustained, though made after the supersedeas. In the other case, the execution having been superseded before it was ripe for a return, was considered a nullity. The principle on which these cases were decided being applied to the case in hand, must lead to this conclusion: that as the *lev. fa.* had been levied, and was ready to be returned before the writ of error, the return was well made, and after the writ of error was at an end, the plaintiff was entitled to the benefit of it; but if the writ of error had been allowed after the execution had issued, but before the levy, the proceedings would have been void. We find many cases in which executions have been set aside for having issued after the allowance of writs of error; but where the allowance has been after the issuing of the execution, the operation has been to stay further proceedings, leaving the matter in *statu quo*. The general rule seems to be, that the writ of error operates as a supersedeas from the time of the allowance, and will therefore avoid an after execution, or levy; but on the principle here contended for, it will have a retrospective effect, by operating on a writ and levy anterior to the allowance. It would seem as reasonable that it should overreach an execution on which a part of the money had been levied and paid over before the allowance, as that it should render void a levy made before the allowance. Neither the necessity of the case, nor the object of the writ, requires such an affect. It does not follow from the allowance that the judgment will be reversed; when, therefore, a levy is made on land, which neither changes the possession, nor restricts the occupant in the use of it, his purpose is gained by a stay of proceedings till the judgment be reversed or affirmed.

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It is decided in *Withers v. Henley*, Cro. Jas. 379; cited by defendant, that a supersedeas is as good a cause to discharge a prisoner taken on a *ca. sa.* as the first process was to arrest him. This, however, is from \*the necessity of the case, for on no other [465] principle can the party have the benefit of his writ of error. While that is pending the plaintiff ought not to hold a satisfaction of his judgment by detaining the defendant in custody. But the case of *Sare v. Shelton*, 2 Roll. Ab. 491, where it was holden, that, if before sale of goods seized under *fi. fa.*, the defendant deliver a writ of supersedeas, he shall have the goods again, because the property is not altered by the seizure, has been declared not to be law. 4 Bac., title Supersedeas, pl. 6, 7; Yelv. 6. In *Charter v. Peter*, Cro. Eliz. 597, the defendant's goods had been taken on a *fi. fa.*, and before sale a writ of error and supersedeas were taken. The sheriff returned the seizure, also that the goods remained in his hands for want of bidders, and that a supersedeas was awarded. All the court held, notwithstanding the supersedeas, in regard it came not to the sheriff until he had begun to make execution, that a *vend. expo.* should be awarded to perfect it. In *Regina v. Nash*, 2 Ld. Raym. 990, it was decided, that if goods are once levied, a certiorari, to remove the conviction, will not suspend their sale. In *Clerk v. Withers*, 1 Salk. 323, it was ruled that the sheriff might proceed to sell, after the plaintiff's death, and that execution being an entire thing, can not be superseded after it is begun. But admitting the case of *Sare v. Shelton* to be good law, it is by no means conclusive as to this case, for when goods and chattels are taken, the defendant loses the possession, and the property may be lost or destroyed during the pendency of the writ of error; but on a *lev. fa.* no such privation takes place. The possession and use of the property remain with the defendant; there is, therefore, no necessity for setting aside the writ and levy.

The second question does not admit of a doubt. The motion was confined to the *vend. expo.* and the appraisement, and the order of the court extended no further. The levy was not comprehended in the motion, and can not be affected by the order. It is the constant practice to set aside valuations of property, without disturbing the levy; and it never has been supposed that such an order rendered it necessary to sue out a new writ, or to obtain a new levy.

\*The next inquiry is, whether the *lev. fa.* of November 25, [466]

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1818, and the sale made thereon, were merely irregular or altogether void. In the case of *Clerk v. Withers*, before cited, it was resolved that the plaintiff's death did not abate the execution; that an execution is an entire thing, and can not be superseded after it is begun; that by the seizure the property was out of the defendant, and in abeyance, and that no further proceedings could be had against him, because the plaintiff had made his election. In *Ladd v. Blunt*, 4 Mass. 402, it was decided that after the sheriff has seized goods sufficient to satisfy the judgment, the defendant is discharged, though the sheriff may have wasted the goods, squandered the money, or has not returned the execution.

In 2 Tidd, 937, it is laid down that when the sheriff takes goods upon a *fi. fa.* to the amount of the sum directed to be levied, the defendant is discharged, and may plead it, etc. In 1 Seld. 571, it is said there ought not to be two executions at the same time, but if one proves ineffectual another may be sued out. In the case before us the first execution did not prove ineffectual; a levy was made and returned, and the property had not been sold when the second execution issued.

In the case of *Stoyel v. Cady*, 4 Day, 222, a *ca. sa.* had been executed after the return day had passed.

The defendant, to procure his discharge, paid the money, and then brought an action against the sheriff and recovered a larger sum than the judgment. The plaintiff, in the original action, paid the money, and after his death his administrators brought a *scire facias* to set aside the proceedings, and obtained a new execution, on the ground that the *ca. sa.* had become a perfect nullity before it was served; that the judgment had been discharged by mistake, and that there had been no real satisfaction. The court sustained the writ, and the plaintiff had judgment. In that case the return day of the *ca. sa.* being past, it was dead in law before it was served, and gave no authority to the officer; there had been a lapse of time; the parties were changed, and the plaintiff must have lost his debt without the relief sought for. In the case before the court there was a levy by Ridgeway, in the life of the 467] defendant, not disposed of. After \*that levy, and the death of the defendant, a new execution issued against him to Holcomb, by virtue of which there was another levy, a sale, and a return of satisfaction.

It is contended by the defendants that these proceedings are

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not void, but only voidable. The distinction between void and voidable is not as distinctly defined as could be wished. It is said that those acts are void which are contrary to law at the very time of doing them, and no person is bound by such an act; but a thing is only voidable which is done by a person who ought not to have done it. 5 Bac., title Void and Voidable, A, pl. 1. By this rule all the proceedings subsequent to the death of the defendant were not only irregular but void. The execution directed to Holcomb was illegal at the time it was taken out: 1. Because there was a previous execution and levy, on which no sale had been made. 2. Because the defendant was dead before it was issued. 3. Because his property, in the hands of his representatives, could not be taken without a previous *scire facias*. Some of the cases cited by defendants' counsel, to show that these proceedings were merely voidable, are certainly strong; but the death of the defendant, and the change of the sheriff, are circumstances which did not occur in either of them, and are sufficient to show that they do not meet the case before us. Had the sale been made by the same officer who made the first levy, the second writ and levy might, perhaps, have been considered as mere nullities, and the sale referred to the first levy; but such was not the fact. The sale was by a person who derived no power or authority from that levy, and if it be supported, it must be done on the efficacy of the last process and the proceedings had thereon. To justify this the first levy must be considered as disposed of by the writ of error; and should that be admitted, the death of the defendant having intervened, a *scire facias* was necessary, and the process should have been against the representatives, and not in the name of the deceased defendant, so that in either case the proceedings must be illegal.

As to the fourth point, the defendants' counsel urge several objections against proceeding by *scire facias*. They insist, from the definition of the writ given in 2 Saund. 70, that it is inapplicable to this case, but they seem to forget \*that there is here a [468 satisfaction of record, which forms the chief difficulty of the plaintiff, and which he seeks to set aside.

The second objection, that a *scire facias* to revive a judgment was unknown at common law, and was given by a statute not in force in this state, as also the third objection, that no writ of *scire facias* can issue against the *terre tenants* until the heir has been

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summoned in, nor against the heir, till the personal representatives have been called on, are predicated on a mistaken apprehension of the object of the writ in the present case, which is to get rid of the illegal proceedings since the death of Sylvester Fuller, so as to proceed on the levy, legally made, in his lifetime. It is not to revive the judgment, or to lay a foundation for process against any of his representatives. If the land levied on, in the life of the defendant, be not sufficient to satisfy the judgment, the plaintiff must pursue the course pointed out by the statute before he can take out execution for the residue. The great object of this proceeding is to avoid the entry of satisfaction on the record, and the proceedings which have led to it, for the purpose of enabling the plaintiff to pursue his remedy, by commencing at the point where the proceedings stood at the death of the defendant.

This is the relief prayed for by the plaintiff, and we are all of opinion that he is entitled to it.

Demurrer overruled.

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469] \*LESSEE OF DANIEL BURGETT v. ELIZABETH BURGETT.

*Statute of Frauds—Creditors—Deeds.*

A voluntary conveyance, made without consideration, and for the purpose of defrauding creditors, is not void, except against creditors or subsequent purchasers.

THIS was an action of injectment, tried at the July term, 1824, in the county of Butler.

The plaintiff gave in evidence a patent from the United States to Henry Burgett, for the land in question, and a deed for the same land from Henry Burgett to the lessor of the plaintiff. The defendant then introduced witnesses to prove that the deed from Henry Burgett to Daniel Burgett was wholly without consideration, and intended to defraud creditors, and that Daniel Burgett had notice of that intention. It was admitted at the trial, that John Burgett, late husband of the defendant, was a creditor of Henry at the time of the conveyance to Daniel; that he died in pos-

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session of the premises; that the defendant, his widow, had continued in possession ever since, and that John was in possession when the deed was made to Daniel.

WOOD, for the plaintiff, contended:

That the statute of this state, for the prevention of frauds and perjuries, although different in terms, ought to receive the same construction as had been given to 13 and 27 Eliz.

SARGEANT and DUNLAVY contended for the defendant:

That the statute must receive a literal construction, and that if the deed was made with an intent to defraud creditors, it was, in the language of the statute, "utterly void and of no effect," and that strangers, as well as creditors, might take advantage of it.

The judges who tried the cause determined to reserve the question of construction for the consideration of all the judges, at the special session next to be holden at Columbus, and with that view instructed the jury in accordance with the literal import of the words of the statute, that if they found the deed from Henry to Daniel Burgett to be without consideration, and intended to defraud creditors, it was void and of no effect, and would not entitle the plaintiff to a verdict.

\*The jury found for the defendant, and on a motion for a new [479] trial, on the ground of misdirection, the question was reserved for decision at the special session.

WOOD, in support of the motion:

The principal question presented for the consideration of the court on the present motion is, whether a deed made or obtained with intent to defraud creditors, or to defraud or deceive purchasers, is void, *ab initio*, under the second section of the statute against frauds and perjuries, or so far only as it shall operate against the rights of *bona fide* creditors or purchasers. In other words, would the deed from Henry Burgett to Daniel Burgett, the plaintiff in this suit, though made with the intent above mentioned, be utterly void, so as to convey no title to the plaintiff against a mere trespasser, without a shadow of title?

It is conceived that the object, and the only object of the legislature, in the enactment of the second section of the statute above referred to, was the protection of the rights of creditors and pur-

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chasers. If such be the fact, the Supreme Court were bound so to administer the laws as to give effect to that object, and to that only. This could only be effected by adopting that construction of the statute which would sustain the deed under which Daniel Burgett claimed possession of the premises in question, except so far as it might operate against the rights of *bona fide* creditors or purchasers of, or from Henry Burgett.

The legislature intended to guard either against the intent to defraud, or against the effect of such intent. That the legislature did not intend to guard against the intent merely will appear sufficiently evident on a moment's reflection.

The judicial tribunals of our country are instituted for the administration, not of the moral, but municipal law. Of the secret views or intentions of men, courts of laws will take no notice, unless those views or intentions have been carried into effect, and have an influence on the welfare of others. The acts of men are the only *indicia* of their intentions which courts of justice will regard, and their intentions are scrutinized for the purpose only of ascertaining the character of those acts. It is for the regulation of their conduct alone, as members of civil society, that laws are 471] \*made and courts instituted. No legislature have ever enacted, no judicial tribunal have ever enforced, a penalty against the mere intent to commit an offense. A violation of the duties which one man owes another may be punished by the community to which the parties belong. But a mere violation of the understanding, which has not been carried into effect, to the injury of any person, never has been, and, it is presumed, never will be, punished by municipal law.

To punish those violations of the duties which man owes to his Creator, in contradistinction to those which he owes his fellow-citizens, is left for that omniscience, which can not err, and that omnipotence, which can not be defeated. If, then, the legislature did not intend to provide against the mere intent to defraud, their object, and only object, must have been to provide against the effects of such intent; to prevent a debtor, who had obtained credit by virtue of the possession and ostensible ownership of property, from avoiding by a fraudulent transfer the payment of debts contracted on the credit of such property; to prevent a purchaser, without consideration, and with intent to defraud the creditors or purchasers of the grantor, from defeating the claim of

a subsequent purchaser for valuable consideration. Agreeably to the construction adopted by the Supreme Court, the deed from Henry Burgett to Daniel Burgett, if made or obtained with intent to defraud the creditors of Henry Burgett, is utterly void, not only as to those creditors, but, *ab initio*, so as to pass no interest to the grantee against the grantor. The term "made," used in the statute, undoubtedly refers to the grantor; and the word "obtained," to the grantee. The intent, then, mentioned in the statute, may be limited to the grantor or grantee. We would beg leave, then, to suppose for a moment, that Henry Burgett, in making the deed under which Daniel Burgett claims possession of the land in question, intended to defraud his creditors—that Daniel Burgett was ignorant of that intent—that the creditors of Henry Burgett were all satisfied without recourse to the land, and that Daniel Burgett brought his action of ejectment against Henry Burgett, to obtain possession of the land. Could Henry Burgett defend himself by saying: True it is, I executed the deed, under which Daniel Burgett, the plaintiff, \*claims possession, but I did it [472 with the view of defrauding my creditors? Here is a case coming clearly within the language of the statute, but we presume that no judicial tribunal, in the exercise of their intellectual faculties, would declare a deed, under these circumstances, void. To obviate this difficulty, it may be said that no man can deny his own deed.

But if we are to adhere so rigidly to the statute as the construction, which the court, in their charge to the jury adopted, would intimate, we are not at liberty to regard anything but the express declarations of the legislature. Agreeably to that construction a deed is void if made with intent to defraud creditors or purchasers in all cases, and under all circumstances. It is admitted that if the will of the legislature be clearly ascertained, a court of law are bound to carry it into effect, however inexpedient or injudicious they may deem it. But from the imperfection that attends language, as well as everything else of human origin, the terms employed to express the intention of the legislature may comprise a variety of cases, which the legislature never contemplated. If, from a reference to the subject matter, the reason and spirit of the law, it may be fairly presumed that the case under contemplation does not come within the object of the law, a judicial tribunal will not extend the provisions of the law to that case. It might with equal propriety usurp legislative power, and



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exercise both legislative and judicial functions. *Cessante ratione ipsa cessat lex*, is a maxim universally adhered to in the construction and application of laws. But it may be remarked that in the case supposed, Daniel Burgett is represented as ignorant of the fraudulent intent. This, so far as regards the construction of the statute is conceived to be a matter perfectly immaterial. A liberal construction of one part of a statute is fruitless, if rendered ineffectual by a strict adherence to the precise language of another part without regard to the object of the law. But admit, in the case before supposed, that Daniel Burgett was aware of the intent to defraud. Will this court say that the object of the statute would be effected by vacating the deed at the suggestion of Henry Burgett, the grantor and defendant? With him the fraud origi-  
473] nated. This court would, it is conceived, \*say to him: You shall not take advantage of your own wrong; you shall not deny your own deed. If you have fallen in the toils you spread for your neighbor, we will not aid you in getting out. The object of the statute was not the protection of the parties to the fraud but of *bona fide* creditors and purchasers, and the court will extend the provisions of the statute no farther than the accomplishment of that object requires. It is an established rule in the administration of justice to assist neither party to an illegal contract to enforce or rescind that contract. If a feoffment be made in consideration to do an act *malum in se*, the estate of the feoffee is absolute, and a bond made on such condition is void, for the estate settled in the feoffee shall not be defeated nor shall a bond be forfeited for the forbearance of such action. But if an estate be to arise upon a condition precedent, that is illegal; it can never have effect. The construction for which we contend, is that put upon 13 and 27 Elizabeth, the object of which we conceive to be the same with that of the second section of the statute against frauds and perjuries enacted by the legislature of Ohio. The statute of New York, enacted for the same purpose, has received the same construction. If such, then, was the object of the legislature, the Supreme Court were bound to adjudge conveyances void for such purpose and to such extent only as might be necessary to accomplish that object. Such was the rule adopted by the English courts in their adjudications under 13 and 27 Elizabeth. Burrell's case, Hop. 166, and Thome v. Newman, 2 Chan. Rep. 37.

The principle adopted in those cases, it is believed, was never

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departed from. But it may be replied, that judicial tribunals are bound by the express declaration of the legislature, however inexpedient they may deem the provisions they have enacted. That if the legislature have declared deeds made or obtained with intent to defraud creditors or purchasers utterly void, courts of law are bound to pronounce them void in all cases, and under all circumstances.

When the legislature have clearly expressed their will upon any subject, courts of law are bound to carry their will into effect. But from the undeterminable character of language, and the imperfect manner in which it presents the operations of the human intellect, it frequently becomes \*necessary, in ascertaining [474 the object of the legislature, to resort to other circumstances than the language which the legislature may have chosen to convey a knowledge of their object to the community, and it is to this object, the purpose which existed in the breast of the legislature, that courts of justice are bound to give effect.

If it can be fairly presumed that the object, and the only object of the legislature, was the protection of the rights of creditors and purchasers, then the Supreme Court were bound so to state the law in their charge to the jury as to give effect to that object, and that object only, however broad or extensive the language of the statute might be.

Agreeably to the position advanced have been the uniform decisions of judicial tribunals.

By 13 Elizabeth, c. 13, it is provided that all leases, gifts, grants, etc., made by any persons or corporations therein mentioned, contrary to the tenor of that act, should be utterly void and of no effect to all intents, constructions, and purposes. Yet it has been uniformly adjudged, under that statute, that the lease made by a dean and chapter against the said statute shall not be avoided, nor any covenants therein contained, during the life and continuance of the dean that made the lease. If, then, we have not been mistaken in supposing that the object of the statute was the protection of the rights of creditors or purchasers, and that the court were bound to effect that object, and that only, it remains to inquire whether the construction put upon the statute, by the court in their charge to the jury, would effect that object. It is conceived that to enable an individual to take advantage of the statute, it must not only appear that he is a creditor or purchaser

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of the grantor of the deed under which the adverse party claims possession, but he must exhibit a claim to the specific property in question.

Until this claim is regularly exhibited to the court for their adjudication, his character as creditor or purchaser must be unknown, and the court will never institute an investigation which must be fruitless, nor make a decision which can never be carried into effect. Will a judicial tribunal, at the suggestion of a defendant, a mere trespasser, who exhibits no shadow of title to the 475] property in question, \*institute an inquiry by virtue of a statute whose object is the protection of creditors and purchasers, into the intent with which the deed was made under which the plaintiff claims possession? Such an investigation would be entirely fruitless. Admit for a moment that the deed from Henry Burgett to Daniel Burgett was made to defraud the creditors of Henry Burgett, and that Daniel Burgett was aware of the intent—that Daniel Burgett brought his suit against a mere trespasser in possession. Would the court, with the view to protect the creditors or purchasers of Henry Burgett, at the suggestion of the defendant, institute an inquiry into the circumstances under which the deed from Henry Burgett to Daniel Burgett was executed. No creditor or purchaser of Henry Burgett could possibly be benefited by such investigation. The court could pronounce no decision on the subject which would operate in favor of creditors or purchasers, if such there were. That the decision of the court may operate on the claim of any individual, he must be a party before the court, and his claim regularly presented for their adjudication. The court, it is conceived, erred in going into the investigation relative to the intent with which the deed from Henry Burgett to Daniel Burgett, the plaintiff, was made, the defendant setting up no title to the premises in question in the character of a creditor or purchaser of or from Henry Burgett. Under no other circumstances could the court institute an investigation into the circumstances under which the deed, by which the plaintiff claims, was executed without an entire departure from the object of the law.

Admitting for a moment that the defendant, in the case before the court, was a creditor of Henry Burgett, and that the deed under which the plaintiff claims was made with the view of defrauding her as such, the court would not be justified in extending the

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provision of the statute to her unless she set up a title to the premises in question, in the character of a creditor or purchaser. She would be no more entitled to the benefit of the statute than any other trespasser. If the premises in question, by virtue of an execution issued on a judgment against Henry Burgett, had been sold, and the defendant had become the purchaser, and the plaintiff had sought to obtain possession, we \*conceive the court might, [476 with propriety, at the suggestion of the defendant, inquire into the circumstances under which the deed from Henry Burgett to Daniel Burgett was executed. In such cases, and in such only, do we conceive the court can with propriety inquire into the intent with which the deed under which the plaintiff claims was made. Upon these principles we rest our motion for a new trial.

See 4 Bac. Ab., title Leases, 118, and cases there cited; 2 Ch. Rep. 37:

DUNLAVY, for defendant:

The true question in this case, if I properly understand it, is this: Is a deed of conveyance made to defraud creditors, etc., absolutely void, or is it conditionally so, or void only as to creditors and *bona fide* purchasers?

I contend that such a deed is absolutely void without any qualification, reservation, or condition whatever; first, because the statute on which the question depends, is positive and peremptory, "shall be utterly void." No language can be more plain, nor can any philologist, judge, or chancellor discover anything in the statute itself, I speak of the second section, that can justify him in giving it a meaning that would lead to, or justify any condition, proviso, or reservation. Statutes can only admit of construction where the cause is doubtful, or where there are various matters treated of therein, or others on the same subject matter. In this case, it becomes lawful, and even necessary, so to construe the statute that the whole shall have its due effect, and that the intention of the legislature should not be frustrated. But here is a simple statute made on one subject, couched in terms as strong and as plain as the English language can furnish; and what are those terms? That every gift, grant, or conveyance of lands, etc., shall be deemed utterly void and of no effect. Now is not this language too plain to be misunderstood, and at the same time too strong to be shaken by any court or judge; nor could it ever have entered into the

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mind of any person to give it a construction different from the plain and literal meaning, except he was biased by preconceived opinions, or by inadvertently concluding that our statute, being made on the same subject as the British statutes, 13 and 27 Eliz., 477] must necessarily, in all \*cases, have the same construction; nor can anything be drawn from the construction given to statutes on this subject in other states or countries. The above-cited British statutes, although on the same subject, appear to be very different in many respects. These are careful of the rights of creditors, and of *bona fide* purchasers, and only make fraudulent conveyances void as to these descriptions of persons. The statute of New York, as it appears from the declaration of Judge Spencer, and in which the whole court concurred, contains the same provisions as those of the British statutes.<sup>1</sup> There can nothing, therefore, be drawn from the decisions of that learned court unfavorable to the position I am endeavoring to establish. But it will probably be contended, that if the doctrine I contend for, should obtain, very serious evils must follow. For instance, that any trespasser, who shall get possession of land, may hold it against all the world, as the fraudulent grantee can not contend with him, as his title is void, and the grantor can not as he has conveyed all his right. Another objection will perhaps be raised, that if the construction should be given the statute I contend for, that a man may avoid his own deed. For if a fraudulent conveyance shall be declared void to all intents and purposes, the maker thereof may, at any time he thinks proper, avoid the same. But these objections will, on examination, be found more specious than solid. For, in the first place, it is impossible that a mere trespasser should get possession of land, under such circumstances as that no remedy could be had against him, but what is founded on title; and as to the other case, it could not possibly happen, because a man is estopped by his own deed, nor can he under any circumstances avoid it, except in cases where he shall charge and prove duress, evident mistake, or fraud in another person. But it does not lie in the power of the court to avoid or annul the force of the statute, whatever consequences may follow. All they can do is to declare the law, and as to the consequences, let the legislature see to these. It will also, probably, be alleged that the court have heretofore given a construction to the statute varied from the one I contend for, and that to invade or depart from that decision will produce

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greater evils than to persevere in the error. If, indeed, the court have heretofore \*decided incorrectly, it is high time that [478 they should retrace their steps, and put the law, which they are bound to support and pursue, on its proper basis. It is, I presume, the first time the question has ever been brought directly before the court, and if in adjudications heretofore made, the statute has been inadvertently overreached, it is no reason why the error should be persevered in, when the matter has been fairly put in issue and clearly understood. But if the court have any doubt on this subject, there are, in my opinion, many things that ought to weigh with them in making up their judgment, and deserve a due consideration, before the court decide that the plain and literal sense of the statute is to be disregarded. It is only by taking the statute in the sense I contend for, that it can ever have any general beneficial effect. Fraudulent conveyances are most commonly made secretly, or at least under such circumstances as the parties concerned calculate that the real state of the case will remain unknown to all but themselves. To unravel and set aside fraudulent transactions of this kind has long engaged the learning and skill of judges and chancellors, but it is to be lamented that all their art and labor have measurably proved abortive. Now the difficulty of developing fraudulent transactions will be greatly increased, if not become insurmountable, when it becomes necessary to pursue the property in the hands of a second purchaser, as it will generally be impossible to bring home to him the necessary notice. Hence, I presume, that on examination an instance will scarcely be found, where a creditor has been able to bring home fraud to a second purchaser, except purchasers *lis pendens*. I trust, therefore, both the letter of the statute, the object of the legislature in passing the law; the mischief to be avoided, and the relief intended to be afforded to innocent persons, will concur to induce the court to pronounce that a fraudulent deed is void. See 18 Johns. 515, 525; Cow. 434.

## Opinion of the court, by Judge BURNET:

The question of greatest difficulty in this case arises from the fact, that our statute, the second section of which embodies, in part, the substance of the second section of the 13th, and the second section of 27 Elizabeth, contains no express words \*confin- [479 ing its operation to creditors, nor any proviso in favor of pur-

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chasers for a valuable consideration and *bona fide*. The section is in these words: "That every gift, grant, or conveyance of lands, tenements, hereditaments, rents, goods, or chattels, and every bond, judgment, or execution, made or obtained to defraud creditors of their just and lawful debts, or damages, or to defraud or deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods, or chattels, shall be deemed utterly void and of no effect."

The statute contains no other provision bearing on the subject.

It will be recollected that the statutes of 13 and 27 Elizabeth not only contain provisos, that restrain them from operating against conveyances made for a good consideration and *bona fide*, but also restrictions, by which conveyances intended to defraud creditors and purchasers are made void only as against the persons intended to be defrauded.

If the language of our statute is to receive a literal construction, the direction given to the jury was correct, but a majority of the court are of opinion that it ought not to receive such an interpretation, as it would lead to consequences not contemplated by the legislature, and would, in part, defeat the intent of the law, which was, not only to prevent the effect of fraudulent conveyances, but to remove, as far as possible, the inducement to attempt them. The literal meaning of the language used, would render the covenous deed void, not only as to the persons intended to be defrauded, but also as to strangers, and even the grantor himself. If the deed be utterly void and of no effect, in the literal acceptance of those terms, the title must remain in the grantor, and he may, at any time, reclaim the property, by proving his own fraud. The consequences of such a doctrine, and the impunity which it offers to those who may attempt to evade the statute, could not have been contemplated by those who framed the law, nor do we believe the rules prescribed for construing statutes require, or admit of such an interpretation.

It frequently becomes the duty of courts, in order to give effect to the manifest intention of the statute, to restrain, or qualify, or  
480] enlarge the ordinary meaning of the words that are used. It is said that the power of construing a statute is in the judges, who have authority over all laws, and more especially over statutes, to mold them, according to reason and conscience, to the best

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and truest use. That the learned sense entertained of the statutes 13 and 27 Elizabeth is, that they render conveyance void, to such purposes, and to such extent, as may be necessary to accomplish their object, and that the construction adopted has been the *rei gerandæ aptior*. Roberts frau: cont. 381; 4 Bac., title Statute, H. S. 1.

The intention of the law-makers may be collected from the cause, or necessity of the act, and statutes are sometimes construed contrary to the literal meaning of the words. It has been decided, that a thing within the letter, was not within the statute, unless within its intention. The letter is sometimes restrained, sometimes enlarged, and sometimes the construction is contrary to the letter. 4 Bac., title Statute, J. S. 38, 45, 50. The object of our statute appears, from its title, to be the prevention of frauds and perjuries, and although it is said, that the title forms no part of the act (1 Ld. Raym. 77), yet the reason of this dictum seems to be the practice of Parliament, by which the title is prefixed to the statute, at the discretion of the clerk of the house, in which the bill originated, but such is not the practice with us. The title is framed in the same manner as the bill, and is sanctioned by the vote of both branches of the legislature; we may, therefore, consider it as explanatory of the object of the law, and it may safely be said that the object disclosed by the title in this case, does not render it necessary to treat a fraudulent deed as utterly void against the grantor, or against strangers who have no interest, claim, or demand, either on the property or on him who has conveyed it. The same inference may be drawn from the language of the section which declares the conveyance, etc., made to defraud *creditors or purchasers*, to be utterly void. Why should it be void? Because it operates as a fraud on the *persons named*, not on strangers, who have no interest in the transaction, nor on the maker of the deed, who is the principal or only agent in the fraud. The intention of the statute, then, was to protect creditors and purchasers, and, to effect this purpose, it can not be necessary to extend it to any other description of persons. The rights of this defendant are not affected by the deed to Elizabeth \*Burgett—it was not made to defraud her—she had no in- [481  
terest in the transaction—she was neither a creditor nor a purchaser, and consequently not one of those for whose protection the statute was made. Every statute should be construed with a



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reference to its object, and the will of the law-maker is best promoted by such a construction as secures that object, and excludes every other.

The rules laid down in Heydon's case, 3 Rep. 7, which direct a reference to the common law, before the statute—the mischief complained of—the remedy provided, and the true reason of that remedy, are sufficient to authorize the construction claimed on the part of the plaintiff.

Although the principles of common law are strong against fraud in every shape, yet we find it decided in Twine's case, 3 Rep. 83, that an estate made by fraud, can only be avoided at common law by him who had prior right, title, interest, debt, or demand, and not by one whose right or demand was more *puisne* or subsequent to the conveyance. The common law, also, of which the statute is said to be declarative, professed to protect only creditors, purchasers, and those having right. It did not extend its care to trespassers, or to persons pretending to claim without right, or to those who might be caught in their own toils. It was moreover considered, in reference to those for whom it professed to give a remedy, too tender in presuming fraud from circumstance, and too rigid in requiring proof.

This was the scope and extent of the common law, and it shows that the mischief to be remedied by the statute, was the difficulty of proof, and the frauds that might be successfully practiced on persons having right, title, interest, debt, or demand, accruing after the conveyance. Neither the condition of strangers, or persons without right or demand, nor the safety of the fraudulent grantor, entered into the consideration of the common law, nor did their case constitute any part of the mischief to be remedied. Hence we may conclude that the statute was intended, exclusively, for the benefit of creditors and purchasers, and was made to increase the facility of avoiding frauds, on such as were creditors and purchasers prior to the conveyance, and to extend the relief to those whose rights might accrue after the conveyance, consequently 482] the interest of the fraudulent \*grantor, and the pretenses of those who have no right, were not within the mischief, and, therefore, not entitled to the remedy.

It being the duty of courts to give such a construction to statutes, as will suppress the mischief and advance the remedy, we are constrained to say that our statute, as it applies to the case

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before us must receive the same construction as though it had contained the restriction and proviso found in those of Elizabeth, nor do we believe that in so deciding, we enlarge the rules, or extend the license given for the construction of statutes. Should a case occur in which the intention of the legislature is doubtful, the literal and obvious interpretation of the terms ought to be adhered to; but, in the case before us, the majority of the court entertain no doubt. The case of the defendant is not within the mischief, nor necessarily within the terms of the remedy. It being decided that the deed in question is void only as to creditors and purchasers, and the defendant being neither a creditor nor a purchaser, it follows that she has no right to impeach it.

On the authority of *Anderson v. Roberts*, 18 Johns. 515, and the cases there cited, we consider this deed as voidable only by the parties aggrieved. It remains doubtful whether the creditors of Henry Burgett will find it necessary to contest it. Their debts may be provided for in a different way, and should that be the case, for what purpose shall the deed be declared void? Shall the title be considered as remaining in the fraudulent grantor, or in perpetual abeyance, or extinguished, so as to protect the defendant by the mere circumstance of occupancy. On the principle contended for, we do not see how these consequences are all to be avoided. If the deed be literally a nullity, the parties stand as though it had never been executed; the title remains in Henry Burgett, and he may show his own fraud to avoid his deed. If, on the other hand, the title has passed from him without vesting in his grantee, and the creditors should be otherwise provided for, it is either extinguished, or in perpetual abeyance, so that no person can question the right of him who may happen to be in possession, though without a color of title. Such a state of things, we are confident, the legislature did not design to \*produce— [483] it was neither the intention of their act, nor was it necessary to secure its object. The title certainly passed by the deed to the grantee, subject to the rights of creditors or purchasers, but not liable to be questioned by strangers who have no claim, and as that was the situation of this defendant, she being neither a creditor nor a purchaser, a new trial must be granted.

Judge HITCHCOCK dissented.

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 Adm'rs of Conn v. Ex'rs of Gano.
 

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## ADMINISTRATORS OF CONN v. EXECUTORS OF GANO.

*Note—Demand—Averment.*

When a note or bill is made payable at a certain time and place, no demand is necessary to charge the maker or acceptor.

Averment of demand, though immaterial, must be proved.

THIS action was founded upon two promissory notes, in which the defendants' testator promised at a day certain to pay a sum of money to the intestate of the plaintiffs. The notes contained the words "*negotiable and payable at the Bank of Cincinnati.*"

Each count of the declaration contained an averment, that the note when due "was presented at the said Bank of Cincinnati, being then and there due and payable, according to the terms thereof, for payment," and alleges non-payment. On the trial, the plaintiffs offered no evidence of this fact, and the defendants objected that without proof of the averment the plaintiffs could not recover; but the court permitted the cause to proceed, reserving the point. A verdict was found for the plaintiffs, and a motion made for a new trial on the ground of misdirection. This motion was reserved for decision here.

**NOTE**, for the defendants :

It is settled in England, that where a note is made payable at a particular place, a demand of payment must be made at that place, and alleged in the declaration, in order to sustain the action. Chitty on Bills, 321 ; 14 East, 500.

The cases of —, —, 8 Mass. 480, and Foden v. Sharp, 4 Johns. 183, seem to indicate a different doctrine; but in the cases of Berkshire Bank v. Jones, 6 Mass. 226, and Woodbridge v. Brigham, Id. 556, 560, \*it is decided that the plaintiff must show that on the day of payment the note was in the bank, and that the servants of the bank were there during bank hours, ready to receive payment and give up the note.

LONGWORTH, contra, cited 17 Johns. 242.

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By the Court:

The plain interpretation of a promise to pay a sum of money at a certain place upon a certain day, is, that the person making the promise will on the day be at the place with the money; if he be not there, or does not have the money there, he has not performed his promise. The right of the plaintiff to receive the money does not depend upon his making a demand. It is absolute by the very terms of the promise. If the defendant is ready at the time and place to pay the money, and there is no person there to receive it, his promise is not broken; the duty to pay the money remains, but no action can be sustained to recover it until a subsequent personal demand be made. This is the plain justice of the case, and is in accordance with the American decisions, which we prefer to follow. It was, therefore, not necessary for the plaintiffs to aver a demand at the place to maintain their action on these notes.

They have, however, made this averment, and though unnecessary, it is well settled, that being made it must be proved. In an action against the drawer or indorser of a bill, it is not necessary to state that the drawee accepted it; but Chitty says, if it be stated, it must, in an action against the drawer, be proved—p. 459. And in page 514, it is again said, that whenever a particular presentment has been averred, it must be proved; for this reason a new trial must be granted.

Judge PEASE:

I concur in the opinion of the court on the first point, but can not on the second.

The averment that the note was presented at the bank, and payment demanded, is decided to be totally immaterial as it respects the plaintiff's right to recover, and also as it respects the defense. The true distinction between an \*immaterial averment which [485 it is necessary to prove, and one which it is not, I consider to be this: When the plaintiff avers in his declaration a fact, the converse of which being pleaded or proved by the defendant would be a defense to the action, then the averment ought to be proved. But if the fact averred be every way immaterial—if it form no part of the plaintiff's right to recover, and if the contrary would constitute no defense to the action—then it would be not only useless to prove it, but would be an unnecessary waste of time and money, and a trifling with the administration of justice.

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Such is the averment in this case; and when no other reason can be assigned for requiring the proof of an immaterial fact, but *that it is averred*, I consider the reason insufficient. If the fact *that it is averred* be a sufficient reason in this case, why not extend it to all others? The common averment in a declaration in slander, that the plaintiff hath always sustained a good character, is really of more materiality than this; because under the general issue, and even upon default, the defendant may prove the contrary for the purpose of lessening the damages, which, so far, is a partial defense; but no lawyer will pretend that this averment of good character must be proved to sustain the action. If the averment be wholly immaterial, it is my opinion that it need not be proved, and I would overrule any authority to the contrary.

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*Bailees—Consideration.*

The delivery of a pledge to a third person, not authorized to receive it, is good consideration for an *assumpsit*.

THIS was an action on the case, in which the jury found a verdict for the plaintiff, upon the first count in the declaration, and assessed his damages to \$300. A motion was made to arrest the judgment, and its determination adjourned to this court, by the Supreme Court sitting in Hamilton county.

The first count in the declaration states, in substance, that on the 5th May, 1818, one Nathaniel Pope was indebted to the plaintiff a pleasure carriage *in part*, and directed and authorized the plaintiff to sell the same to any person for a sum not less than \$300, and to receive and apply the moneys to the plaintiff's own use. That on the 1st May, 1822, J. W. Pope, the defendant, in consideration, that the plaintiff would deliver to him the carriage, promised to pay him \$300, when thereto afterward requested; and avers a delivery confiding in this promise.

HAMMOND, in support of the motion :

There is no consideration alleged in this count sufficient to sustain a promise to pay money.

It is not a declaration upon a sale of the carriage under the authority to sell, set out in the first part of the count; a mere naked agreement by the owner to deliver a chattel to a third person, is not a foundation whereon to ground an assumpsit to pay anything. An agreement to deliver only, and a delivery in pursuance of the agreement, would give to the party receiving the delivery no power over, or authority to use the chattel. The owner's right to reclaim immediate possession would not be impaired, and a demand to have the chattel restored to the possession of the owner, would put an end to the rightful possession of the person to whom it was delivered. A refusal to redeliver upon demand would give the owner a right to recover the value in an action of trover. A mere naked agreement to deliver possession confers no right or benefit.

\*An agreement to deliver a chattel to be used or kept for a [487 specific purpose, or for a time certain, would stand upon a different ground. And there is no case of a declaration upon a naked agreement to deliver. There must be a loan, a pledge, or a sale, connected with the contract to deliver, to make out a consideration in assumpsit for the delivery of a chattel. If, then, the carriage had been the undisputed property of the plaintiff, his declaration makes no case upon which he could recover. As the case really is, he has much less color of right.

Upon the case as stated in the declaration, the owner of the carriage pledged it to the plaintiff, in security for an existing debt, with an authority to sell it provided it would sell for three hundred dollars, and receive and credit the proceeds to the owner's account.

It is a well-settled doctrine that the right of property in a chattel pledged, remains in the pawnor. And that the pawnee can not sell the pledge, so as to vest an interest in the purchaser, except according to the stipulations upon which the pledge was made. 2 Caine, 202; 2 Ves. Jr. 378; 5 Johns. 258; 8 Johns. 96; 12 Johns. 146; Croke Jas. 244.

The plaintiff in this case received the carriage as a pledge, and agreed to sell it if it would bring \$300. He had no power by his contract to dispose of it upon any other terms, and his delivering it to a stranger was a violation of his agreement with the owner. The delivery is not alleged to have been made for any purpose

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consistent with the proper use of a pledge, or the special right of the pawnee. It is stated as a general delivery. The pawnee having thus parted with the possession of the pledge, in violation of his agreement, the right of the owner to reclaim it from the defendant immediately attached to it. So that the defendant acquired no right whatever, not even the right to keep possession, or to use it. The owner might consider it a sale, and charge the pawnee with the \$300; or he might reclaim his carriage from the defendant, and upon a refusal to deliver it, recover the value in trover. The consideration alleged in the declaration is, therefore, objectionable: First, because the plaintiff founds it upon a violation of his own agreement; and second, because the defendant received no advantage from the delivery. He did not purchase, 488] neither did he obtain a right to use or retain. For even if the original owner's right did not attach, the right of the plaintiff, as pawnee, to demand an immediate return, was not affected by the delivery—the declaration merely stating the naked delivery of the pledge, and stating no agreement that the defendant should keep and use it.

If the contract had been that the plaintiff should redeliver the pledge to the owner, and in consideration thereof the defendant would pay \$300, the value, the case would have stood differently; or if the contract had been in consideration that the plaintiff would deliver the pledge to the defendant, at the request of the owner, it would have been well. In either of these cases, the plaintiff would have acted lawfully. He would have violated no obligation; because it was lawful for him to restore the pledge to the owner. And it was lawful for him to do it upon a just consideration. The defendant would have, in the event of receiving the pledge with the assent of both owner and pawnee, a legal title to the pledge, according to his contract for receiving it with the owner. But here, the delivery being tortious, he acquired no such right.

It is not pretended that the plaintiff sold the pledge to the defendant in execution of his authority. Take the case in the strongest sense for the plaintiff, and the carriage remains in pledge to this day between the plaintiff and the owner. No time was fixed for the sale of the pledge, or for its redemption. No measures had been taken to enforce a redemption before this suit was brought. By the payment of the debt due from the owner at any

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time hereafter, a right to demand the carriage, and to recover its value, either against the plaintiff or against the defendant exists, and can be enforced against the defendant. The plaintiff's recovery can not bar the recovery of the owner. The case in *Croke James*, of the hat-band set with pearls, was a recovery against the person to whom the pledge was delivered. The defendant ought not to be made twice liable for the same chattel.

But whether the plaintiff be considered as the general or the special owner of the carriage, the agreement to deliver it only, without authority to keep or to use it, is not a sufficient consideration whereon to ground the action.

\*GUILFORD, for plaintiff:

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It is alleged in arrest, that no sufficient consideration is set out in the declaration to sustain the action.

The contract as set out is not a *nudum pactum*. The plaintiff was actually damaged by the performance of his part of the contract. Relying upon the promise of the defendant, he parted with the possession of a chattel which was available in his hands to the full value of it.

"If there be any benefit, labor, or prejudice, however trifling, it is deemed a sufficient consideration." 1 Com. 16.

But the plaintiff was not only prejudiced by the delivery of the carriage, but the defendant was benefited by the possession, however temporary. The case in *Cro. Eliz.*, cited in Com., was for "the consideration that the plaintiff would deliver to the defendant certain goods in which the plaintiff had only a special property;" and this was held a sufficient consideration, "for the defendant has a benefit by the *present possession*." 1 Com. 14; *Cro. Eliz.* 218; *Yelv.* 4, 50, 128.

For the same reasons, the defendant can not avoid his promise by showing that the plaintiff exceeded his authority, for granting that the plaintiff had only a special property in the carriage, and could convey no title to it except the bare possession, subject to be taken from him whenever the pawnor chose; yet from the case in *Cro. Eliz.*, above cited, the "present possession" is a benefit sufficient to sustain the action. No fraud or deception is alleged by the defendant—the contract was fair, mutual, and well understood for aught that appears in the declaration. If there are any defects in the declaration they are cured by the verdict—for: "The



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court will infer almost anything after verdict; and want of certainty in the description or CONSIDERATION, or of the *contract itself*, will be thereby aided." For unless these defects or omissions were proved on the trial, "it is not to be presumed that the court would have directed the jury to give, or that the jury would have given the verdict." 1 Chit. 402; 1 Saund. 228, a, note 1; 1 Johns. Cas. 100; 1 Johns. 276; 2 Johns. 571; 15 East, 290; 11 Johns. 143.

**490] \*By the Court:**

It is not necessary to constitute a good consideration for an *assumpsit* that the party making the promise should receive any actual value or benefit from the party to whom the promise is made, if, in consequence of the transaction, a loss has been sustained by such a party; this has long been settled.

In this case the plaintiff parted with his pledge, by which he lost a security for so much of his debt, and also rendered himself liable to N. Pope, the owner, for the value of it. This prejudice to him, incurred at the request and upon the promise of the defendant, constitutes a good consideration to sustain an action of *assumpsit*. It is of no importance that the defendant could gain no advantage from the contract; he took that risk upon himself, and the fact does not render the contract *nudum pactum*. The motion must be overruled, and judgment rendered for the plaintiff.

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**HUNT AND PHILLIPS v. ABRAHAM FREEMAN.**

*Intention—Mistake—Trust.*

The court of chancery will carry into effect the intention of the parties, where, by fraud or mistake, such intention is not embodied in a written agreement.

A trust executed according to the intention of the parties is good at law, where there is no court of equity to aid it.

THIS was a bill in chancery, prosecuted by the complainants to obtain a decree quieting their possession of section 35, township 4

east, 2d entire range in Symmes' purchase, and to enjoin perpetually execution upon a judgment in ejectment, recovered against them in the supreme court of Warren county, from which court the cause was adjourned for decision here.

The material facts charged in the bill were as follows: On the 16th of July, 1789, Clarkson Freeman, under whom both parties claim, made a contract with J. C. Symmes to purchase of him eight sections of land specifically described, one of which is the land in dispute.

In January, 1790, Freeman agreed with Elias Boudinot for the purchase of six land warrants, for a section of land each, and agreed, upon certain terms and conditions, to locate them in Boudinot's name upon six of the sections purchased of Symmes. The warrants were numbered 235, \*236, 237, 238, 239, 240. On [491 the 22d of May, 1790, three of these warrants, numbered 237, 238, 239, were located upon three of the sections as agreed upon; the warrant 239 being located upon section 35, the land in dispute.

In the year 1792, Clarkson Freeman, being in prison in New Jersey for a judgment for a large sum of money, escaped, and in October of the same year he made a power of attorney to his brother, Ezra Freeman, authorizing him to dispose of the lands held upon the six warrants purchased from Boudinot.

The judgment creditor of Clarkson Freeman prosecuted a suit against the sheriff for the escape of Freeman, when, for the purpose of indemnifying the sheriff, on the 7th of December, 1795, an agreement was entered into between Clarkson Freeman, by his attorney, Ezra Freeman, Elias Boudinot, and Aaron Ogden. By this agreement the interest of Clarkson Freeman in three of the sections of land, held upon the warrants purchased of Boudinot, was pledged in trust to Aaron Ogden as trustee, to be sold at certain times and upon certain terms and conditions, to raise the money recovered against the sheriff. The entries being made in the name of Boudinot, he covenants to convey the legal title to Ogden should a sale be required, and Freeman covenants that if payments are not made this shall be done. In this covenant the lands subjected to the trust are described only by the number of the warrants supposed to be located upon them, which are specified as numbers 235, 236, 237, neither of which is located on the section 35 now in dispute.

Immediately after the completion of this arrangement, the com-

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plainants, Hunt and Phillips, purchased the judgment against the sheriff, and on the 17th of May, 1796, released it as against the sheriff upon receiving from the trustee a deed declaring the trust.

In September, 1796, the complainants received from Symmes a deed for section 34, covered by warrant 237, for the first installment, which was not then due. This deed was made with the assent of Freeman.

The second installment fell due December 8, 1797; it was not paid, and no measures were taken to execute the trust with respect to it. It remained unpaid, and on the 5th of November, 1798, 492] Symmes conveyed to Boudinot the \*sections 34 and 35, neither of them located upon the warrants described in the trust agreement; and on the 5th of December following Boudinot conveyed these two sections to Ogden, under the contract of trust, to be sold to raise the remaining installments, the latter of which would fall due December 8, following. On the 8th of January following, Ogden, in execution of the trust, sold the two sections of land to the complainants. Upon this title the complainants rested their claim.

The defendant claimed under a conveyance duly executed from Symmes to Clarkson Freeman, in September, 1796, for the section 35, and a deed from C. Freeman to himself, dated February 5, 1799.

The bill charged that it was the intention of the parties to cover and secure such sections as had been located, let them be covered by any number of the warrants, provided there were not other sections located more correctly answering the description. It also charged that Ezra Freeman gave assurance at the time the trust agreement was made that all the warrants were regularly located; but that in fact three only of the six warrants were located, and that the other three never were located. The three located warrants covered the three sections sold, including that in dispute.

The principal facts stated in the bill were admitted in the answer. It was silent as to the allegation that Ezra Freeman represented all the warrants as located, and it averred that each of the six warrants was located, and described the land upon which the location was made. It claimed to be a purchase for valuable consideration, but did not deny notice.

Aaron Ogden testified that Ezra Freeman informed him that

the warrants were all located, and that the trust contract was entered into under that opinion. That land, and not floating warrants, was understood to be the subject of the contract.

Jon. Dayton testified that Ezra Freeman and A. Ogden requested him to value the lands. That he understood from Ezra Freeman that the warrants were all located, and made the valuation upon that impression.

It was in full proof that two of the warrants named in the \*trust agreement, numbers 235 and 236, were not located at [493 the time that agreement was made. The sections upon which the answer alleged that they were located were not of the number sold to Freeman, upon which he contracted with Boudinot to locate them; and besides this, the same section had been conveyed by Symmes to Boudinot before these warrants were located upon them. The time of the location of the other warrant was not explained, nor was it certain that it had been located. The section named in the answer as covered by it was not one of the number sold by Symmes to Freeman, and referred to in the agreement to Boudinot.

Two witnesses testified that so early as 1796 they heard the defendant state that he knew the complainants had a mortgage on the land in dispute.

**ESTE**, for the complainants:

1. It was manifestly the intention of the parties to the mortgage to pledge three sections of land, and not floating warrants.

This intention is distinctly expressed in the agreement, and is fully proved by the testimony. It is also fully proved that at the time three sections only were located. The intention of the parties can only be carried into effect by subjecting those three sections; and it is a well settled rule that "grants are to be construed according to the intent of the parties." 3 Bacon, 293; 4 Cruise on Real Property, 293, 294; 4 Dall. 347; 3 Johns. 388; 1 Mass. 219.

It is a just inference from the whole testimony that Ezra Freeman, when he gave assurance that all the warrants were located, knew the contrary. He therefore practiced a fraud upon the other parties. This fraud attaches to his principal, who, having led the other party into error, shall not be permitted to allege his own wrong to defeat the operation of his own contract.

2. The contract of trust attached at the time of its creation to

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this section 35. It was a fraud in C. Freeman, when he knew this, to take the legal title. This fraud can avail him nothing. The complainants purchased the equity, the right upon which the trust operated, at a fair sale, for a fair consideration, and are the right-  
494] ful owners. In the \*hands of C. Freeman this section must be considered the property of the complainants.

3. The present defendant is not an innocent purchaser without notice. Notice of the complainants' claim is brought home to him by the testimony of two witnesses, corroborated by all the circumstances. And besides, notice is not denied. The nature and effect of notice is well understood. 2 Fonb. 143, 150; Sugd. Vend. 484; 4 Mass. 638; 6 Id. 488, 489; 2 Ves. Jr. 437; New. Con. 511; 2 Atk. 54; Hardin, 37; 1 Johns. Ch. 303, 575; 2 Ves. Jr. 454; 9 Ves. 32.

HAMMOND, for the defendant:

Assuming that the case is not varied by the defendant's answer nor by the proof, and considering the case as if the title remained in Clarkson Freeman, the complainants maintain that, as it was the clear intention of the parties to convey land and not warrants, an equitable interest in the land was created by the deed of trust, and that as against Clarkson Freeman the complainants as purchasers, at the trust sale, acquired this equity, upon completing the purchase and paying the purchase money. Admitting all the premises assumed, we think the complainants' conclusion a most obvious *non sequitur*.

Although it were the intention of the parties to convey land, it is very clear that they did not succeed in carrying that intention into effect. The conveyance in this respect is intrinsically defective; it does not perfect the intention of the parties. The deed tripartite never attached upon section 35. The trustee had no power over it under the deed. As to it the deed was inoperative. At the time the trust was created the legal title was in Symmes. The terms used in creating the trust did not touch this section. Before the time limited for the execution of the trust, in any part of it, expired, Symmes vested the legal title in Clarkson Freeman. When the trust was executed, in January, 1799, a complete subsisting legal title for this section, in Clarkson Freeman, was of record in Hamilton county, operating as notice to all the world. The purchasers under the trust purchased nothing but a legal title.

The trustee sold nothing else; had power to sell nothing else; and of consequence the purchasers could acquire nothing else. They \*purchased the title sold, such as it was, not a secret [495 equity between the parties, growing out of an intention not expressed in the deed. But admitting that they purchased this equity, what is it?

It was the intention of the parties in making this contract to create a trust upon the section 35 in dispute; but the terms of description used, did not include it, and therefore the conveyance executed did not carry the intention of the parties into effect. But the original contract, upon which the deed tripartite between the parties is founded, created a right which subsisted between them, and which equity will enforce; that equity was to subject this section 35 to the trust created for the payment of the judgment. This trust, thus founded, a court of equity might be called upon to decree and enforce. But certainly a court of chancery can not interfere at once to set up this equity, and to confirm an ineffectual and void attempt to subject the land, by an execution of the trust at law? Had application been made in a reasonable time, it is possible a court of equity would have charged section 35 with the trust, and decreed a sale of it to pay the trust money. This is all that equity could have done at any time. Now it is too late to do that.

If the complainants at the trust sale purchase this equity, they could only purchase it as it existed in the *cestue que trust*. They could not acquire an absolute title to the land, neither could they acquire a right to call upon a court of equity to invest them with that legal title. So that admitting that the purchasers at the trust sale acquired the equity, and that they may now set it up in a court of chancery, still they can now only claim to have it subjected to the trust, and sold upon equitable terms, to refund them the money advanced. This is not asked by the bill, nor is a case made upon which a decree of this character can be founded.

The purchasers at the trust sale, the present complainants, were not the original *cestue que trust*, although they subsequently became the owners of the debt, to secure which, the trust was created. Having purchased the debt and obtained from the trustee a deed declaring the trust, they obtained whatever equitable security was created by the original contract. In their hands this equity acquired no new \*character by the purchase under the trust [496

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deed. When they come into a court of chancery to set it up, they can not claim to have it converted into a legal title. They had, by the original contract, an equitable security for money, and in their hands equity must still consider it such. They may ask equity to aid in executing the trust. But they can not ask to have a void effort to execute the trust at law confirmed, and a complete legal title vested in them. Their situation can be no better than that of a purchaser at the trust sale, who was a stranger to the previous proceedings. Conceding, therefore, to the complainants the facts they assume, they can not have the relief prayed for.

It is, however, by no means admitted that the whole facts of the case place it upon the ground assumed by the complainants.

The bill charges that it was the intention of the parties to convey lands, and not floating land warrants; and also that it was "*the design of the parties to cover and secure such sections as had then been located, let them be covered by what they might, provided there were not at the time other sections located more correctly answering the description, and that the said Elias was induced principally from that consideration to join in the contract.*"

The bill also charges that at the time of the contract, three only of the six warrants were located, and that the residue have not yet been located. And that there were no other lands in the Miami Purchase which Boudinot could convey, except the three sections, 24, 34, and 35.

The proof of these allegations are essential to support the complainants' case, and they evidently so considered it, when they charged them in their bill.

It is satisfactorily proven that it was the intention of the parties to create a trust upon land, and not upon floating land warrants. But this proof is not enough. The parties in the deed have described the lands they meant to convey, and proof of the fact that they meant to convey land, is not sufficient to sustain an allegation that they meant to convey any other particular tract. Every conveyance of land imports of itself an intention to convey land and not floating evidence of title; but where one tract is specially described in the deed, this general evidence of an intention to convey \*land can not authorize a court of equity to decree the conveyance of any other specific tract not described in the deed. Possibly this might be done where a clear intention

to convey a tract different from that described in the deed is made out in evidence. But that is not the case here.

The complainants rely upon the depositions of Boudinot, Ogden, and Dayton to prove this intention. Their evidence goes no further than the deed itself, which clearly evidences an intention to convey land. Boudinot says nothing about the intention. Ogden says the intention was to convey lands, and adds, "naming the numbers of the warrants in the contract, was not the result of a choice or preference, *but merely to designate which of the located sections should be taken.*" This falls far short of sustaining the allegation in the bill, that it was the design of the parties "*to cover such sections as might be then located, let them be covered by what they might.*" Here was a positive intention to designate particularly, and not a word about a design to include other than the designated lands. Dayton is equally silent as to the fact of an understanding or design, in regard to located lands, except that lands and not warrants was the subject of the contract, and this is evident from the contract itself. The complainants' case is not strengthened by these depositions. They prove no material fact whatever.

The case of Russell v. The Trustees of the Transylvania University, 1 Wheaton, 438, is, in all its essential points, similar to this. The complainants alleged, in that case, that the grantor conveyed one tract of land, when he intended to convey another. They alleged a mistake in carrying the intention into effect, and sought to rectify it. They set out that the grantor had but one tract in the block of surveys, one of which was conveyed, and that it was the design to convey the tract to which he had title, not that to which he had none. They alleged, also, that he derived title under a particular warrant, and they alleged, as is alleged in this case, that it was the intention of the parties to the deed, that it should pass the two thousand acre survey, by whatever boundary described, to which the grantor was entitled under the warrant. The court held that without full and explicit proof of this latter circumstance they could not interfere; \*even then they only [498 say, "it is *possible* the court might be induced to think the plaintiff's case a good one."

As the intention to convey located lands is made out, it is argued that a mere unintentional error ought not to *destroy* the security intended. This argument would be worth something, were



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the bill prosecuted by the *cestui que trust* to set up the security. But it has no application here. It admits that the trust did not, at law, attach to the land in dispute, and the purchasers under the trust at law, purchased nothing but that upon which the trust deed operated. The mistaken notion that notwithstanding the mistake, the deed was really as operative as if no mistake existed, that the purchaser of the supposed legal title could claim in equity all that the *cestui que trust* might have claimed, has confused the complainants throughout. The same error must have confused others, or this cause, in its present shape, could not have remained so long in court.

But even between the original parties the consequence of this mistake could not be that which the complainants insist upon. It could not entitle them to fasten the trust upon other lands than those described, unless it be shown that such other lands were really the subject of the contract. That lands were intended to be conveyed, and were not, would be a good reason for avoiding the contract in equity, but would be no sufficient reason for attaching it to any land, owned by the grantor, under warrants purchased of Boudinot, much less could that circumstance authorize the *cestui que trusts* to choose whether they would take 27 or 35. If it were in evidence that the section 35 was one actually contemplated by the parties; that it was one of the sections actually valued by Dayton, and that the parties supposed they had described it in the deed, then there is no doubt but that equity would secure it to the *cestui que trust*. If it were in proof that the trustees sold, and the plaintiffs purchased, section 35 without having discovered the mistake and under the belief that it was properly described, there could be no doubt about the case. But this is not pretended. The bill disavows any contract for a particular section, and goes for whatever sections might be located, and if more than three, then for a choice. It is claimed to make the tripartite 499] contract, confined in its terms to specific numbers, a \*floating conveyance, to be fastened down upon such tracts as may best suit the views of the *cestui que trusts*. This, we say, can not be done. So much of the tripartite contract as fairly bears the character which the complainants give it, is void for uncertainty.

The complainants claim that Abraham Freeman is a purchaser with notice, and stands in the same situation that Clarkson Freeman himself would stand. Whatever the facts in the case might

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make out on this point, we must concede that upon the answer, the case is not so made that the defendant can protect himself as a purchaser.

**Ezra**, in reply:

It is admitted that land, and not floating warrants, was the subject of the contract of trust. Three sections were pledged—three sections only were located. If Ezra Freeman meant to act honestly, his intention must have been to mortgage these sections. The intention of all the parties was a pledge of land. These three sections only could be pledged, and therefore the trustee had a right to fasten the trust upon them.

The case cited by the defendant's counsel from 1 Wheaton, we think, is in favor of the complainants.

It is true in that case it is stated that the grantor intended to convey one tract of land, and by mistake conveyed another; but it is manifest that the case turned upon the question whether there was *sufficient evidence of that intention*. If this intention had been made clear, notwithstanding the great reluctance avowed by the court, from the antiquity of the transaction, to inquire into the intention, there can be no doubt that a decree would have been rendered for the complainants. The court say that "the whole equity of the complainants must depend upon the alleged intention of the parties at the time of the conveyance." "And here," they say, "we find the case wholly unsupported by proof." That there was nothing like it to be found in the deed, in the answer, or in the extrinsic evidence in the cause. But in the case before the court, clear and satisfactory evidence has been produced of the intention alleged in the bill. In that case there was no proof—here it is conclusive.

\*But the defendant's counsel insists, that if section 35 was [500 pledged, the complainants did not purchase the equitable title at the trust sale.

The trustee was authorized to sell *all the interest*, whatever it might be, that Clarkson Freeman had in section 35. It is true that it was expected that Judge Symmes would make a deed to the trustee before the sale, so that the whole title, legal and equitable, might be sold if the payment were not made. Such a deed was made, but not until after one had been executed to Clarkson Freeman. If the deed to C. Freeman had not been made, the pur-

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chasers at the trust sale would have acquired the whole title; but the legal title passing to C. Freeman after the contract, only made him a trustee for the purchaser at the sale. At the time of the contract he had only the equitable title, and if the legal title had not passed from Judge Symmes, the sale could have been made by the trustee of *all the rights* of C. Freeman to the section, and Judge Symmes would have held the legal title in trust for the purchaser.

It is contended that if the equitable title were sold, the whole of that equity was the right to charge section 35 with the payment of the debt—that they have no other right than the original *cestui que trust*—that they acquired no additional right by the purchase—and that, consequently they can not call on a court of equity to invest them with the legal title. In reply it is urged, that the contract was *not only a security* for the payment of the debt, but contained a *power to sell* on failure to pay. This power was exercised without question with respect to the two sections, the legal title to which was vested in the trustee. It would not be pretended that it was necessary for application to be made to chancery to charge sections 24 and 34 for the payment of the debt. But C. Freeman had as good a right to authorize his interest in section 35 to be sold as the other sections, and the mere circumstance of the legal title subsequently passing to himself, can not possibly alter the case. If, in addition to the security for the debt, there had not been coupled a power to sell, the argument of the defendant's counsel would have been unanswerable. But C. Freeman made A. Ogden his agent to sell all his title to section 35, 501] on a certain contingency; that took place, and the \*complainants, the representatives of the original *cestui que trust*, became the purchasers. Before the defendant, then, can resist our claim with success, he must show that the owner of an equitable interest can not sell the same so that the purchaser can call upon the holder of the legal title for a conveyance; for the complainants have all the equity that the *cestui que trust* and C. Freeman ever had to the section. The moment the sale was made C. Freeman held the legal title in trust for the purchasers. The sale was fairly made, a valuable consideration paid, and the whole business transacted by an agent fully and legally empowered. Why, then, have not the purchasers a right to call on a court of chancery to invest them with the legal title?

**By the Court:**

There is no doubt but that it was the intention of the parties to the contract creating the trust, upon which the complainants found their title, to subject lands and not floating warrants. This is manifest from the whole testimony, and the reasons why the numbers of the warrants was adopted by way of description is obvious. Freeman had agreed to locate the warrants upon six out of eight specified sections. Proceeding upon the ground that all the warrants were located, but the parties not being informed of the six sections they covered, this mode of description was the best within their reach. If the warrants had been all located, as Ezra Freeman asserted, the description would have been sufficient. That it was defective, is to be attributed to the mistake or the fraud of Ezra Freeman, and is in no respect the fault of the other parties.

The intention of the parties to describe particular and distinct tracts of land was not carried into effect by the writing executed between them in consequence of a common mistake. The defendant can not ask to place the case upon fairer ground than this, because if Ezra Freeman was not mistaken, when he assured the other parties that all the warrants were located, he was guilty of misrepresentation and fraud; which is a more unfavorable view than attributing it to a common mistake.

The mistake was that three only of the six warrants were located, and of these three, one only of those upon which \*the [502 trust was given, the other two were still unappropriated. It is not to be doubted that upon the discovery of this fact, a court of equity would have charged the trust upon the three located sections, because in so doing they would do nothing but perfect the original object and intention of the parties. It would be but correcting the mistake into which the parties fell from a deficiency of correct information at the time the contract was executed between them.

When this matter was transacted there was no court of chancery in this country where the lands lie to take cognizance of the case. And if there was a court of chancery in New Jersey, neither the party nor the subject was within its jurisdiction; the parties, therefore, could only proceed to do that which a court of chancery would direct to be done, and when the rights of the parties were thus fixed, rely upon a court of law to sustain them.

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As the property upon which this trust was created was circumstanced, the parties did not require the aid of a court of chancery, and this aid could at no time have become necessary had not Clarkson Freeman obtained a deed from Symmes in violation of the original agreement with Boudinot. By that agreement the control of the legal title to the whole six warrants, or the lands they covered, remained in Boudinot to be transferred to Freeman upon the performance of certain acts. Boudinot having a right to control the title to the whole, had covenanted to convey three that they might be subjected to a particular trust. It rested with him to carry the intention of all concerned, in the trust agreement, into effect, by conveying any of the sections located, in the execution of the trust, when it was ascertained that those designated were not appropriated. It was his duty to retain his control over three sections of the land, if there were so many secured, to satisfy the trust. In the actual case a court of chancery would have enjoined him from parting with this control had he attempted to do it. He might properly, notwithstanding the mistake in the description, have conveyed the three located sections to Ogden, and it would have been a good execution of the trust agreement on his part. No court of chancery, upon the application of Freeman, would have interfered, upon the case as it stood, 503] to restrain Boudinot from thus proceeding; and such a \*proceeding must have been subsequently sanctioned by a court of law.

When Clarkson Freeman obtained the conveyance from Symmes for section 35, he knew that it was one of the three located sections which his agent had agreed should be subjected to the trust. He knew there was no other land upon which the trust agreement could operate, and it was a fraud upon that agreement to take the legal title to himself so as to exclude the agreement from operating upon it. It was also a fraud upon Boudinot, in whom, by Freeman's own contract, the control of the legal title was to remain. By this fraud, as against those upon whom it was practiced, Clarkson Freeman acquired no beneficial interest. The title passed to him, but the subject remained liable to the control of Boudinot, under both the original and trust contracts. And it was competent for Boudinot, in the execution of the trust, to enable Ogden to sell actual ownership, though not the naked legal title to the land. And in a country where there was no court

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of chancery, a court of law would enforce the validity of the sale by giving the purchaser the possession, and regarding the beneficial ownership as superior to the naked legal title.

It is the opinion of the court that the trust attached upon the three located sections at the moment of executing the trust contract, and that the power to execute this trust was not defeated, or in any degree impaired by the conveyance of Symmes to Clarkson Freeman, which, in respect to the trust, was fraudulent and void. The trust was well performed according to law at the time, and the purchasers at the trust sale became the owners of the land. They are well entitled to the possession, and also to have the legal title united with that possession, such as it exists in the hands of Freeman. A perpetual injunction and a conveyance is decreed.

Judge BURNET, having been at one time counsel for Hunt and Phillips, did not sit in this cause.

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\*GEORGE HOUGH v. DAVID YOUNG.

[504]

*Voluntary Undertaking—Variance—Damages.*

A plaintiff can not support his action by proof contradicting the averments in his own declaration.

The day may be made material by averments.

Damages must be founded upon evidence.

THIS was an action on the case against the defendant, who was cashier of the Zanesville Canal Bank. Its object was to charge the defendant for negligence in so protesting a note left with him for collection, and to take the steps necessary to charge the indorser, that the indorser was not charged.

The cause was tried before the supreme court of Muskingum county, and a verdict given for the full amount of the note. At the trial the court instructed the jury that "the plaintiff was entitled to recover, and that there being no evidence of the ability or inability of the maker of the note, nor any other evidence to show the extent of the plaintiff's injury, the jury, in estimating

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the damages, must exercise a sound discretion, and be guided by such light as they had upon the subject."

A motion was made for a new trial on the ground of misdirection, and the decision reserved for this court.

It was proved at the trial that an agent for the plaintiff handed the note to the defendant, as cashier of the Canal Bank, requesting him to have the same note legally protested; that the defendant took the note, and afterward informed the same agent that the note was protested. It was also in proof that the defendant took the note to the notary public on the 2d day of August, 1819, with the words, "*July 30, August 2,*" indorsed upon it, and informed him there were no funds in the bank to meet the note. The notary immediately protested the note, gave notice to the indorser, and returned the note to the defendant the same evening or the next morning.

The note was dated the 2d day of May, 1819, payable sixty days from the 1st of June, in the same year.

CULBERTSON & GODDARD, in support of the motion, made two points:

1. That upon the proof the action was not maintainable.
2. The instruction given by the court, as to the rule of damages, was incorrect.

505] \*The testimony is, that the defendant took the note to have it *legally protested*. He was not a notary public, and could not himself protest it. The proper interpretation of his undertaking is, that he was to hand it to the notary for protest, if not paid when due. It was the duty of the notary to protest it at the right day, and if he made a mistake the defendant is not responsible.

The negligence complained of is, that the note was protested upon the second and not upon the third day of grace, and the court, in a suit against the indorser, has decided that this protest and notice did not charge him. If the action be sustained, it establishes the principle that a man may be subjected for damages for error in judgment in transacting a business in which he professed no skill, and for which he was to receive no compensation.

For this Jones on Bailment, 57, is cited; but admirable as is the arrangement, and systematic as is the reasoning of this treatise, it

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must be received, not as an adjudged case, but as the reasoning of an able lawyer. The author's great respect for the civil law sometimes leads him into mistake with regard to the common law. On this very subject Judge Kent, in the case of *Thorne v. Deas*, 4 Johns. 100, asserts that the doctrine in the essay is "*totally unfounded in reference to the English law.*"

*Coggs v. Bernard*, 2 Ld. Raym. 909, is a case of gross neglect, in not doing that with proper care which the party took upon himself to do; but this is a case of error in judgment as to the time when the note ought to be protested.

The case of *Wilkinson v. Coverdale*, 1 Esp. 75, terminated in a nonsuit. The manuscript case cited by Erskine, and the conversation between him and Lord Kenyon, are not entitled to the weight of a decision by a full court. The whole relate to insurance cases, and are not applicable here. None of the cases relied on by the plaintiffs stand upon the same principle as this case.

*Bankrupt v. Blackburn*, 1 H. B. 158, and *Moore v. Mourgue*, Cowper, 479, are both strong cases for the defendant; they both put the liability upon the ground of bad faith, or gross negligence, and upon the testimony neither can be here imputed to this defendant. It is not pretended that this was a bank transaction; if it were, the bank, and not the defendant, \*would be [506] liable. As an individual transaction, the notice would be in due time. The defendant did not profess to be versed in the law of notices to indorsers on promissory notes; if he erred honestly he is not liable.

The misdirection as to the rule of damages renders it necessary to grant a new trial. If a plaintiff prove a cause of action, his right to recover damages depends upon the proof of injury. Without such proof he can have nominal damages only. When it is adduced, the damages must conform to it. The jury are sworn to decide the whole case according to evidence. The damages they find must be predicated upon proof, not upon the surmises or suggestions of their own minds.

HERRICK and STILLWELL, against the motion:

The defendant received the note, and undertook to have it "*legally protested.*" The plaintiff charges that the nature of this undertaking was to give such notice to the indorser as would subject him, if the note were not paid when due. The jury heard



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the testimony, and have found the fact to be as claimed by the plaintiff. Upon this motion the contract must therefore be taken as alleged in the declaration. The same answer may be given to the suggestion of the defendant's counsel, that the undertaking was only to deliver the note to the notary; and it may justly be added, if this was the undertaking, why indorse upon it, as a direction to the notary, the time when it fell due.

It was the duty of the defendant to take care that notice of non-payment was so given to the indorser as to fix his liability. He received the note for this purpose; and this he attempted to perform. He retained the note until he supposed the time for payment passed: He then delivered it to the notary for the sole purpose of so proceeding as to subject the indorser. He did this on the second day of August, when it was ineffectual, instead of taking care that it was done upon the third day of that month, when it would have been operative. By this blunder the plaintiff has lost his recourse against the indorser, and the drawer being insolvent has lost his debt. And this loss, it is contended, ought not to fall upon the defendant, because he possessed no skill in 507] the particular matter he undertook, was to receive no \*compensation, and made a mistake in law, only, without any evil intention.

The doctrine, however, is otherwise settled, and we think clearly and rightly so settled. In *Coggs and Bernard* the defendant professed no skill, and was to receive no compensation, and the negligence for which he was charged resulted from accident, not design. There can be no doubt but that with more strict care than was used, the hogshead of brandy might have been put down in safety. So, with a more strict attention in this case, the defendant might and would have discovered that the third, not the second day of August, was the proper day to protest this note.

It is not the compensation to be received that is the ground of liability. It is the duty necessarily resulting from the undertaking to do an act affecting the property of another, and the confidence reposed in the expected performance, and these are equally imperative whether there is to be compensation or not. The case of *Coggs and Bernard* is a full authority for this. And in this particular the observations of Sir William Jones, in his essay on Bailment, 57, agree with the opinion of Lord Holt, and of Lord Kenyon, in the case of *Espinasse*, and Judge Kent, in the case

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referred to from New York, 4 Johns. 96, also recognized the doctrine to be correct.

The case from Henry Blackstone, and the one from Cowper, so strongly relied upon by the defendants, both stand upon their own circumstances. They bear no analogy to this case, nor do they impugn the general doctrine. On the contrary, the situation of this defendant, as cashier of a bank, whose duty it is to be conversant with the manner of protesting notes so as to charge an indorser, places him very much in the same situation, in that respect, as a clerk in the custom-house, in relation to the entry of goods, and, in the case from Blackstone, Lord Loughborough admits that a clerk in the custom-house would have been liable.

The question of damages was properly left to the jury. A new trial ought not to be granted on this ground, even if the court consider the instruction incorrect, unless there is reason to believe that justice has not been done; and this is not pretended.

\*It is alleged, in the declaration, that the misfeasance in [508 giving notice or making protest, was committed on the 3d of August; the proof is, it was committed on the 2d. The time alleged in the declaration is not material. It was only necessary for the plaintiff to prove that the wrongful act was committed before action was brought. Such is the rule in all actions on the sounding in tort, and even in contract, where the time is not a material part of the agreement itself.

By the Court:

The declaration states that the note in question was dated the 20th day of May, 1819, and was payable sixty days from the 1st day of June in the same year. It also avers that the defendant, on the 3d day of August, 1819, proceeded to make the demand and give the notice of non-payment necessary to charge the indorser; but did these so negligently that the indorsers were not charged. At the trial the negligence proved and relied upon was, that the demand and notice was made upon the 2d day of August, which, being the day before the last day of grace, was inoperative. The proof is in contradiction to the declaration which avers a demand and notice on the right day. This being the material point of the whole case, it was certainly not competent for the plaintiff to sustain his action by proof so essentially variant from his allegations; though in personal actions generally the day is immaterial,

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it may nevertheless be made material by the pleadings. And such is the case here; the declaration gave no notice that the negligence complained of referred to the day of giving the notice. The defendant could not come prepared to repel that which the plaintiff averred; yet this he must do, if, upon the proof offered, the plaintiff could recover. The instruction of the court, that the plaintiff ought to have a verdict, was therefore incorrect. It is unnecessary to decide upon the principal ground of liability.

The rule laid down for assessing damages was also incorrect. If the drawer of the note is solvent, the plaintiff may yet recover from him the amount. This right is not affected by a recovery here. In that event this defendant is only answerable to the 509] plaintiff for the expense incurred in taking \*measures to charge the indorsers, and for disappointment in that particular. To charge him with the whole amount of the note the plaintiff ought to have produced proof that the maker was insolvent. In the absence of this, and of all other proof, he could only recover nominal damages.

New trial granted.

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WILES AND OTHERS v. BAYLOR.

*Lands Valued on Sale in Chancery.*

Land sold under a decree in chancery for the balance of the purchase money due to the vendor must be valued, and sell for the proportion of valuation, as required in case of land sold upon execution.

THIS was a writ of error to the common pleas of Brown county. The case was as follows: Baylor, the defendant in error, sold a tract of land to the plaintiff in error, and retained the title in his own hands, until the purchase money should be paid. The purchasers failing to pay, he prosecuted a suit in equity to have the land sold for the purchase money due. The court decreed a sale, and that Baylor, the vendor, should convey the legal title to the purchaser under such sale. The decree did not require the land to be valued and sold for a proportion of its valuation; but directed a sale without regard to valuation. Upon this ground the writ of error was brought to reverse the decree.

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BRUSH and FITZGERALD, for plaintiffs in error:

Insisted that in this state an appraisement or valuation is necessary in all cases of sale, to satisfy any judgment or decree.

The act regulating judgments and executions of the year 1820, section 15, requires an appraisement and valuation of the property, being real estate.

The fortieth section of the chancery law, in force at the time, declares that a decree shall have the force, operation, and *effect* of a judgment at law.

Where process of execution is issued upon a decree, the forty-second section directs the same proceedings as at law. See vol. 18, p. 240, secs. 40, 42.

The second section of the act, providing for the recovery of money secured by mortgage, directs that the mortgaged *\*prem-* [510] ises shall be taken in execution and disposed of in the same manner and under the same regulations as for the satisfaction of judgments.

It is, and uniformly has been, the policy of this state to require appraisements and valuation of real estate, when the same is to be sold for the payment of debts, and that the same should not be sold for less than a certain proportion of the appraised value.

If execution be issued on any decree, to collect the money directed and ordered to be paid, the act expressly requires the same proceedings as at law, of course an appraisement and valuation. But it is contended that when the court decree a sale, they have a discretion to direct an appraisement, or to direct a sale, without appraisement, to the highest bidder. There can be no doubt but the court in such case *may* direct an appraisement in all cases, when they decree a sale of real estate. Will this court sanction the principle, that it *may* or *may not* be done at the discretion of the court? That decrees upon this subject may be different, under the same laws, and be agreeable to the same policy? One man may have his estate sacrificed, while another's must bring two-thirds of the appraised value? If this case is not expressly provided for in any act, then it is left to the judicial discretion of the chancellor; that discretion, when once exercised, becomes a rule; to be a good rule, it should be uniform, agreeable to the spirit and intention of the general laws upon the subject, and be guided by that general policy. All the laws upon the same subject will be taken together, the intention of the legislature ascer-

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tained by comparing one with another, the general policy adopted and sanctioned, that it may be uniform; and if such case as this is not within the express words of any of the acts, yet if it is within the scope of a general policy, agreeable to it, and so within the equity of those remedial laws, it is believed the court will prefer that construction which harmonizes in one uniform rule; a rule which will thus be agreeable to the spirit, meaning, intention, and policy of the laws in all other like cases. When the legislature have declared the effect of decrees to be the same as a judgment at law, and that in the enforcement of them, by execution, the proceed-511] ing shall be the same, there is no reason to doubt the \*intention to produce a uniformity. If it is in the intention of the legislature and within the equity of the statute, it is as much within the law, as if in the express words. 6 Bac. Abr., title Statute, 382-385.

If such be the law, then the decree of the court of common pleas, directing a sale of real estate to the highest bidder, without directing an appraisement according to the law, is erroneous and must be reversed.

COLLINS, for defendant in error:

The principal error assigned is, "That the land was decreed to be sold without appraisement, for the best price that could be obtained, at public vendue."

The defendant in error contends that there is no error in the proceedings and decree upon the following grounds:

It is a principle too well settled to now admit of doubt, that in equity a vendor has a lien upon land sold, whether conveyed or not until the price of the land or consideration of the sale is paid; and the giving of a note for the purchase money does not affect the vendor's lien; and if part of the purchase money be paid, the lien is good as to the residue, and the death of the vendee does not alter the claim. This equitable lien gives a vendor a *right* to resort to the estate sold to raise the money due as the price of it, on failure of the personal property of the vendee to make the money. The *remedy* to enforce this lien, and obtain this right, is only by an application to a court of chancery to decree a sale of the vendee's equitable interest in the land, to pay the consideration money (when the estate is not conveyed), and this sale, according to the usages and practice of courts of chancery, is-without ap-

praisement. In support of the doctrine or principles here laid down, I will call the attention of the court to the case of *Garson v. Green and others*, 1 Johns. Ch. 308, 309, and the cases there cited; *Sugden on Vendors*, 352, 354.

Inasmuch as courts of chancery have exclusive jurisdiction of cases like the one under consideration, equitable estates not being liable to be levied on and sold under execution at common law, the party who is compelled to resort to this court for his right, must unquestionably be permitted to have his remedy according to the well-settled usages and practice of this court, unless [512] this remedy is subject to some restrictions or limitations by virtue of some statute which regulates the practice of the court or abridges the right of the party.

The provisions of the act regulating judgments and executions, and of the "act regulating the mode of proceeding in chancery," which relate to sales of land under execution by the sheriff of the county, under execution upon judgments at law, or decrees in chancery, can not, by any fair construction, be applied to decrees in chancery of this kind, to be carried into effect by a commissioner of the court's appointment, according to their own rules and practice; being a case not provided for by statute, but within the ordinary, peculiar, and exclusive jurisdiction of the court; and all those provisions for the sale of land relate to sales of legal titles. This case can not be assimilated to an ordinary decree of a court of chancery for the payment of money in a case of original jurisdiction, when, by express provision of the statute, the decree has the same "force, operation, and effect of a judgment at law from the time of the actual entry of the decree;" which decree, by express provision of the act, is enforced by "*feri facias et levare facias*, against the goods, etc., of the defendant (*generally*), upon which writ the same proceedings shall be had as at law;" 18 Ohio Laws, p. 240, sec. 40, 42; because in the latter case there is an express direction by the statute as to the mode of enforcing the decree, and reference is had to the act regulating judgments and executions at law, and the lien of the complainant only commences at the time of entering judgments or decrees, and is only so far a lien on defendant's property as the judgment or decree has priority in date to other judgment creditors. But in the case before the court the lien is not created by the judgment or decree; it exists from the time of the contract, and it rests upon

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the particular property which was the subject of the contract. The decree gives the complainant no right; it only gives the party the aid of the process, and officers of the court to carry into execution a previous right to sell a particular piece of property to pay for itself; and if the case is not embraced within the statute by implication, the sale must be without appraisement, as that 513] principle is entirely a \*creature of the statute not known at common law—not known or practiced by courts of chancery.

If, then, the decree in this case is, as I conceive it is, in strict conformity to the principles of equity, and the usages and practice of courts of equity, anterior to the passage of the statutes before cited, and the rights of the parties are not altered or their remedies changed by those acts, the decree is correct.

By the Court:

The decree, in this case, directs the interest of both vendor and vendee to be sold, and the complete legal title to be perfected in the purchaser at such sale. The policy of requiring lands sold under execution for debt to be valued, pervades the legislation of the state, and has prevailed for many years. In directing a sale of real estate, especially where the legal title is to pass, a court of chancery is not at liberty to adopt a different policy. This court have determined that mortgaged premises sold under a decree in chancery to raise the money due on the mortgage, must be valued, and sell for a proportion of the valuation. The same reason applies to this case. The decree is erroneous, in not directing a valuation, and for that cause must be reversed. •

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**JOHN EMERICK v. ARMSTRONG, GRANDIN, AND OTHERS.**

*Administrator—Appeal.*

In a joint action against several defendants, one may appeal the whole cause as to those against whom judgment is rendered with himself, by giving the bond required by law.

An executor or administrator, defendant in a joint suit, can appeal the cause as to co-defendants, without any security being given.

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A cause settled by agreement will not be examined into where there is no suggestion of fraud.

THIS was a bill in chancery, prosecuted by the complainant against Armstrong and Grandin, survivors of John H. Piatt, deceased, his heirs and administrators, and the administrators of A. H. Ernst, deceased. While the suit was pending in the common pleas, the subject of it was adjusted between the parties; but they could not agree who should pay the costs. They thereupon entered into a written agreement, to submit the question of costs to be decided by the court of common pleas, as though no adjustment had been made, and upon hearing, the court of common pleas decreed costs against the defendants. From this decree the defendants \*appealed, but gave no bond, the administrators of [514 Piatt and Ernst contending that they had a right to appeal, under the law, without giving security. A motion was made in the Supreme Court to quash the appeal, and the decision of this motion as well as on the final hearing of the case was adjourned to this court.

N. WRIGHT, for the complainant:

In this case Armstrong and Grandin, and the heirs of Piatt are the parties really interested. It is even doubtful whether it were necessary to make the administrators parties, but it is clear that the decree could not affect them, except for costs. However, therefore, it might be in case where administrators, or the estate they represent, would be liable to satisfy the decree, yet, in the present case, where those who are defendants in their own rights, are alone to be affected by it, they are not exempt from giving bond. 2 Mun. 341. The intention of the statute is to give a plaintiff security for his claim, wherever the defendant, by his own act, makes void a judgment or decree once rendered, and obtains delay. In case of administrators, when the claim is against the estate they represent, the administration bond stands in the place of such security; but where a co-defendant will alone be liable to satisfy the judgment, that bond is no security whatever, and the plaintiff loses entirely the right secured to him by statute. It would be unjust that an administrator, in every case where he may be made party merely for purposes of discovery, account, etc., having no interest of the estate to defend, should be able to drag



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with him into the Supreme Court any suit, however important, and defeat any decree, whatever the amount, for which his co-defendants only were liable. In such a case, should the question arise whether the administrator was a proper party, the court would be placed in an awkward situation. If the bill be dismissed as to the administrator, he being not a proper party, the case is not appealed, and this court have no jurisdiction over it, not even to make that order.

Our appeal is purely a creature of the statute; the arbitrary act of the party perfects the appeal and gives jurisdiction to the Supreme Court. If the steps have been taken which the law requires, the judgment or decree in the court below is annulled, and the suit is in progress as though it had never been rendered; if not, the Supreme Court has no jurisdiction of the case. The general requisition of the statute is, that bond shall be given; the exception is, that administrators, etc., may prosecute "*appeals by them made,*" without bond. They may prosecute their own appeals, but not those of others. The persons who are defendants in their own right must give bond, or no appeal is made; the exception can not extend beyond the terms of it, and the legislature might easily have embraced the present case, had such been their intention. The spirit of the statute is to protect administrators, etc., from personal liability, and they can in no case be required to execute a bond on appeal; but it does not follow that the appeal is perfected without bond in a case like the present. This construction may sometimes subject administrators to inconvenience, but the same inconvenience often results from disobliging associates as party in a suit.

This appeal ought to be dismissed upon its own peculiar circumstances. It is a decree upon a question referred to the court by consent, upon an agreement by the parties to conform to the decree that might be rendered. The litigation was settled upon the faith of that agreement, and the decree is only for costs. 2 Mad. Ch. 438; 2 Johns. 138; 11 Mass. 394.

If the appeal be sustained, the court ought not to investigate the merits, but affirm the decree below. It is in the nature of an award, and concludes the parties in the same manner with an award.

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B. PIATT, in support of the appeal:

It is admitted that the law does not contemplate imposing any act upon an executor or administrator which shall subject him to incur a personal responsibility in the fair and honest execution of his trust. This admission is considered a surrender of the question. The administrator is made defendant without any volition of his own, and he has no control over his co-defendant. Should he deem the decree or judgment against him erroneous, he can not appeal unless his co-defendant will unite with him and give a bond. The consequence may be, that he must submit to a decision deemed unjust, or take a personal \*responsibility upon [516] himself. The absolute right of appeal given to executors and administrators, without giving security, is thus embarrassed and restricted. It were safer to extend their privilege to their co-defendant, than thus to embarrass them.

The peculiar circumstances of this decree can not affect the right of appeal. This is given from all decrees, and here is a decree. That the opinion of the court was, by consent of parties, confined to a single point, instead of extending to the whole case, can make no difference.

By the COURT:

The first question to be decided in this case is, whether an administrator can, by appealing, take up the case as to his co-defendants, without any bond being given upon the appeal. Many reasons may be urged, with about equal force, upon both sides of this question.

There are some cases in which one of several co-defendants may appeal the cause separately without affecting the others. This may be done where the action is in its nature joint and several. In an action of trespass, tried in the supreme court of Warren county, against two defendants, one was acquitted and the other found guilty by the jury. The court decided that the defendant convicted had a right to appeal without his co-defendant; and that the plaintiff, if he wished to keep both parties in court, could do it by appealing himself.

But where the action is joint, the defendants must stand or fall together, and the question presents more difficulty.

It may be said, shall one defendant, who is satisfied with the judgment, be compelled to follow his co-defendant to the Supreme

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Court, where additional costs may be awarded, and higher damages? And this in a case where the defendant who appeals is irresponsible, and that very irresponsibility a strong inducement to indulge a litigious disposition, in the security of having nothing to lose? In this there would be great injustice.

On the other side, it may be asked, shall the only responsible defendant, and upon whom the whole burden rests, be deprived of his appeal, where he thinks justice has not been done him, be-  
517] cause his co-defendant, secure in his \*poverty, will not unite in consummating the appeal? This result would at least be equally unjust. The question, therefore, must be decided without reference to the inconvenience of either view of it, and upon the naked matter of right and power under the statute.

The provision of the law is, that in civil cases an appeal shall be allowed of course from any judgment or decree. The mode is prescribed in which the party wishing to appeal shall consummate it. One defendant can give notice, and if he can give the bond the law requires, he can perfect the appeal. No act is required calling for the joint agency of all the defendants; but the whole power of appealing the cause is given to any party who desires to exercise it. To require the concurrence of all the defendants in consummating an appeal, would be to give the statute an interpretation not warranted by its terms, nor by its general object and spirit. The court are consequently of opinion, that in a joint action one defendant or one plaintiff can appeal the whole cause by giving the notice and the bond required by law.

The law regulating this right of appeal directs, that in general cases the appellant shall give a bond, but with respect to executors and administrators the right of appeal is given upon different terms; no bond is required, and it is sufficient for an executor or administrator to give notice and docket the appeal in the Supreme Court. As one defendant can consummate an appeal of the whole case by doing what the law requires in giving the bond, so, by the same rule, an executor or administrator, by doing what the law requires of him, can perfect an appeal of the cause, not only for himself, but for his co-defendants, in all cases where the interest is joint, and where an appeal as to one must be an appeal as to all. This must be the rule, otherwise the administrator can not use the privilege of appeal without subjecting himself to a responsibility not imposed by law.

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Against this rule it is objected, that it permits the privilege given to executors and administrators alone, to be enjoyed by others for whom it was not intended, and thus prejudices the plaintiff's right to have security upon the appeal. This is true; but the absolute right of the administrator \*to appeal, without giving secu- [518 rity, is as clear and as strong as the absolute right of the plaintiff to have security from the co-defendant, and it is certainly the policy of our laws, that, in this collision, the right of the administrator should prevail.

The exemption is secured to him that he may proceed with confidence in protecting the interests committed to him; for were his duty to be connected with his personal responsibility, the feelings of self-interest might prevail so far that the administrator would regard rather his own safety than the interest under his direction. Require an executor or administrator to give security upon an appeal, and you require him to hazard his own estate; for, as the law now stands, he would be personally liable upon his bond, and personally liable to indemnify the security in case of loss. Impose this responsibility upon an executor or administrator, and its natural consequence would be to induce, at least in cases of difficulty, an abandonment of the interests he represents and should protect. It is obviously of much more public importance that the estates of deceased persons should be faithfully administered, than that an individual, setting up a claim against such estate, should fail to obtain an additional security for his claim in the progress of litigation. For it must be remembered, that in allowing the appeal to be perfected, without the bond and security, the complainant loses nothing that he ever possessed; and in respect to the right so confidently asserted to be an absolute one, it is, in fact, a decision that upon a just construction of the whole statute, no such right is, in the particular case, secured to him. The appeal must be sustained.

The merits of the case are easily disposed of. The parties have settled the subject of controversy, and by written agreement referred the question of costs to the court of common pleas, to be decided upon the point whether the complainant's bill could be sustained; and if sustained, to tax the costs against the defendants, otherwise against the complainant. This point the court of common pleas decided in favor of the complainant; and thus the whole cause is disposed of under the agreement of the parties by the umpire to whom they referred it. Nothing is left for this \*court [519

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to do, but decree the costs to the complainant, conformable to this agreement. This court never investigates the rights of parties settled by themselves, except upon suggestion of fraud or imposition.

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Nowler, Douglas, and others v. Daniel L. Coit.

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*Lands sold by Administrators—Taxes.*

Purchase money paid to an administrator upon a sale of intestate's land can not be recovered of the heir where the sale is inoperative and the heirs recover the land.

Taxes paid by a purchaser shall be refunded, with interest and expenses of making the payment, where the heir comes into equity to disincumber the title.

In the year 1792, the State of Connecticut, then claiming certain lands situate within that tract of country in the now State of Ohio called the Connecticut Western Reserve, granted 500,000 acres, by particular description, to certain individuals to remunerate them for suffering during the revolutionary war. This tract of country received the name of the fire lands. At the time of this grant the Indian title was not extinguished.

After the grant, and while the land was subject to the jurisdiction of Connecticut, as claimed by her, the legislature of that state incorporated the proprietors of the land, who were residents of Connecticut, and empowered them to do various acts for the preservation of the property, and the extinguishment of the Indian title, and among other matters, empowered them to assess a tax upon the land to raise funds for its preservation.

On the 30th of May, 1800, the governor of Connecticut, in virtue of an act of Congress, and of an act of the legislature of Connecticut, ceded to the United States the jurisdictional claims of that state to the tract of country called the Western Reserve, including the fire lands, and the same were constituted part of the county of Trumbull, and made fully subject to the jurisdiction of the territorial government of the then Northwestern Territory.

The ancestor of the complainants was one of the grantees. He

died in Connecticut, before the year 1801, and letters of administration on his estate was granted to Daniel Douglas, by the court of probate of the district of New London, in Connecticut, in February, 1801, and that court upon a representation of the administrator, directed the interest \*of the intestate in these [520] lands to be sold for the payment of debts. The sale was made on the 24th of March, 1801, and the defendant, D. L. Coit, became the purchaser, at a fair price, and received a deed from the administrator.

In April, 1803, the legislature of Ohio incorporated the owners of these lands, for the same purpose and upon the same principles originally embraced in the Connecticut act of incorporation. It authorized the directors to extinguish the Indian title, and to make partition among the proprietors, to levy and collect taxes.

Upon the tracts partitioned to the right of Douglas, the defendant, Coit, paid the taxes, as well those assessed by the company as those assessed by the state. But no improvement was made upon the lands, nor were any offers made by the heirs of Douglas to pay the taxes.

The bill was brought by the heirs of Douglas claiming the lands as in their possession accompanied with the legal title, and calling upon the defendant to disclose under what title he set up a claim. The defendant, in his answer, set up the purchase under the administrator, and he claimed, if the title was adjudged defective, to have the purchase money and taxes refunded, with interest. The Supreme Court, sitting in Huron county, adjourned the cause here for decision. The judges who heard the cause in Huron county, having strongly intimated an opinion that the sale could not be sustained, that question was not argued nor insisted upon by the defendant's counsel.

WHITTLESSEY & NEWTON, for defendant:

The complainants come into equity to have their title freed from the embarrassment of the defendant's claim. They can only ask this upon equitable terms. They must refund:

1. The money paid to the administrator of their ancestor's estate, with interest.
2. The amount of taxes paid to the company, with interest.
3. The taxes and interest paid to the state.
4. The expenses incurred in paying the taxes, with interest.

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521] \*Money paid under a void authority may be recovered back in the equitable action of assumpsit. 2 Com. 49; Ld. Raym. 742.

To charge the complainants with the money paid to the administrator is not making them debtors against their will. They have taken credit for it in settling their ancestor's estate; and they claim the identical lands partitioned to the defendant under the purchase. Both these acts involve an implied assent to become debtors for the money. It would be unconscionable to retain it, and take from the defendant the consideration for which it was paid.

The taxes, both to the company and to the state, were paid by the defendant. By these payments the estate was saved from incumbrances. The complainants, in seeking to hold the land, claim the benefit of these advances, and therefore ought to be held accountable. By asserting the possession in themselves, they virtually admit the defendant to be their trustee; the land was partitioned to him; he took charge of it, and paid the taxes. No other act of ownership, or of possession, was exercised by any one. The complainants can have no possession but that of the defendant. They make him their trustee for the possession, and they must account to him for his advances as a trustee. 1 Ves. Jr. 337; 1 Johns. Ch. 39.

The right to be reimbursed the taxes, includes the right to be reimbursed the money expended in making the payments, as the incident follows the principle.

LATIMER, for the complainants;

The matters of account for which the defendants not only claim to be paid, but to have a lien decreed upon the land, appear altogether unprecedented.

That for the purchase money stands upon no known principle. Who ever heard of a grantee in a void quitclaim deed recovering the purchase money paid? How can a claim for money paid to an administrator be set up against the heir? It might as well be maintained against any other stranger. The administrator had nothing to do with the land. It was not assets in his hands. 4 Bibb, 402. If he received the money, his securities as administrator are not bound for its application.

522] \*As to the repayment of the taxes, it is to be remarked, that in the vast multitude of cases both in England and in our sister states, where parties have been evicted from lands by su-

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perior titles, not one case is found where any such reimbursement has been made. Even our occupying claimant law does not cover taxes. The defendant purchased at a speculation, and he made payment of the taxes at this risk. The chance of his gain was, that his possession and payment of taxes might secure him the title by aid of the statute of limitations. It was upon this chance he made the payment, and not upon an expectation to be reimbursed by the plaintiffs.

There is still less color for charging the plaintiffs with the taxes assessed by the company or corporation. They were infants, and never assented to the charter so as to become members. 2 Mass. 269. It is argued that by claiming the specific lands partitioned to the defendant, the plaintiffs recognize the partition made by the company, and affirm it, and with it all the doings of the corporation. We deny this consequence. Partition may be made by parol. Here all the grantees unite in setting out the right of our ancestor, and our acquiescence binds us in nothing else.

By the COURT:

The defendant's counsel have very correctly abandoned the validity of the sale, and conveyance made under the order of the court of probate of Connecticut. At the time the order was made the State of Connecticut had no jurisdiction over the lands in question. They were subject only to be sold and conveyed under the laws of the then territorial government. The sale to the defendant is neither authorized nor sanctioned by these laws; it is, of consequence, inoperative. The title remains untouched in the heirs to whom it descended.

The purchase money paid by the defendant upon the sale constitutes no charge upon the land in the hands of the complainant. The lands of the deceased were never legally charged with the payment. The administrator, from whom the defendant purchased, had no power over them. He paid his money upon a mistake as to the consideration. The present complainants are not the parties \*to whom he paid it, or with whom he made the contract; and [523 his right to recover back his money can not be litigated with them, neither at law nor in equity. We can therefore make no decree with respect to the purchase money.

The amount paid for taxes stands upon a very different ground. These were chargeable by law upon the land, and the payment was



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a direct benefit to the complainants. It was their duty to pay. In the case they failed to do this, the land was liable to be sold for the taxes. They have derived a benefit from the payment, and in equity ought to refund the money. In one sense the defendant is a mere volunteer in making the payment; but when the owner of land in such case omits to pay the taxes as they fall due, he adopts the payment made by such volunteer, and as to that, constitutes him his agent, by recognizing his acts. Perhaps a court of equity might not, in every case of such volunteer, and upon his application, decree a lien for the taxes; but where these taxes have been paid under an opinion that the person who paid them owned the land, and when the true owners come into equity to examine that claim of ownership, and to have it quieted, the rule that he who asks equity must do it, strictly applies. The court will not lend their aid to quiet the title, without securing to the defendant the moneys paid in preserving that title; moneys which the owners ought to have paid, and without the payment of which the land would have been lost.

The taxes assessed by the company are not to be distinguished from those assessed by the state. The whole, with interest, are justly due, and the payment must be charged upon the land.

The commissions, or other expenditures necessarily incurred in the payment of the taxes, also constitute for the defendant an equitable claim against the complainants. It is a charge inseparable from the payment of the taxes, which, had the complainants paid the taxes themselves, they must have incurred; and therefore, upon obtaining a decree of this court to rescue their title from suspicion, they must repay this expenditure to the defendant.

The cause must be sent back to the county of Huron, with directions that the master commissioner take an account of the payments made for taxes, and expenses in making \*such payments, with interest upon each sum paid from the time of payment; upon which a final decree must be entered, upon the principles here decided.

## ISAAC EDWARDS v. JAMES C. MORRIS.

*Performance of Contract—Rescission of Contract.*

- A complainant in chancery asking to set up a contract different from the written one, upon which judgment was had at law, must show an offer to perform the contract he claims to establish at the time it ought to have been performed, and also a readiness still to perform it.
- An obligation to pay in the notes of a specific bank, must be paid in the notes of that bank, or their numerical value in money. Their price in money can not be substituted.
- A contract is not rescinded upon stale objections to the vendor's title, the vendee remaining in undisturbed possession.

THE bill had a double aspect, each containing separate and distinct matter nowise connected with the other. It states:

1. That on the 25th day of December, 1819, the complainant purchased of the defendant a certain farm, and distillery, in Hamilton county, for the sum of eight thousand dollars, to be paid in different installments, the first two of which, amounting to four thousand dollars had been paid; that the third installment for two thousand dollars was to be paid on the 1st of February, 1822, and the *fourth*, for the same sum, was to be paid on the 1st of February, 1823, and that for these several sums of money the complainant executed to the defendant his several promissory notes of hand, promising to pay the sum of money mentioned in each, *in current bank notes of the city of Cincinnati*; that the defendant, previous to said purchase, stated to the complainant he would receive in payment the notes of the Miami Exporting Company for the purchase money, and at the time of executing these notes, the complainant *supposed* that they contained a stipulation to pay only in the notes of the Miami Exporting Company, and that he would not have executed them had he understood otherwise; that the two first installments, for which notes were also given, the said defendant had been paid according to the terms of the contract as understood by the complainant; that when the *third* note became due, the defendant informed the complainant he would receive no funds as payment other than notes current as cash in Cincinnati, and

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that *at the time* the notes of the Miami Exporting Company had depreciated to *twenty-five or thirty cents* on the dollar; that the defendant had brought suit on the said third note, due February 1, 525] 1822, \*in this court, and had recovered judgment thereon for the amount thereof and interest.

2. That the land purchased by the complainant of the defendant was the northeast quarter of section 21, in the 4th township, and 2d fractional range of townships, on which the complainant had paid four thousand dollars, estimated by *him* at two thousand dollars, and which, as *he* alleges, at a present cash valuation is about as much as it is worth, and that since the said purchase he has discovered that the title to the same is not complete and perfect; that on the 20th of June, 1795, it was originally conveyed by John C. Symmes, but the conveyance never proved or acknowledged; that in the year 1787, John C. Symmes sold, by contract on record, a large quantity of lands to one Benjamin Stites; that about the 1st of February, 1793, he acknowledged, in writing, to have received a large sum of money on said contract; and that 10,000 acres of the land for which the money was paid laid around Columbia; that on the 17th day of December, 1787, the said Symmes gave to said Stites a certificate that he had entered or located 10,000 acres on the Ohio and Little Miami; that these several papers contain evidence *that said Symmes could have no authority to convey said lands*, except from said Stites, and that the said quarter section is contained within the said tract of 10,000 acres. And prays an injunction on said judgment at law, until the title is perfected; that the contract may be rescinded; that the money already advanced to the defendant be refunded to the complainant; and that, when the title shall be perfected, an account taken of the value of the notes of the Miami Exporting Company at the time the contract was made, or at the time said notes became due; and a prayer for general relief. The defendant demurred.

WADE & HAYWARD, in support of demurrer :

The defendant insists that as to the *first part* of the bill no case is stated, and no case is made out, which is not as much within the cognizance of a court of law as of a court of equity; and the subject matter in controversy between the parties having been tried and adjudicated by a court of competent jurisdiction, by this court before all the judges in bank (1 Ohio, 189), the complainant is not entitled

to \*relief in chancery. 3 Atk. 740; 6 Vesey, 682; Cooper's [526 Eq. Plead. 124; 1 Johns. Ch. 91; 1 Schoale & Lefroy, 201.

The attempt of the complainant to go behind the terms of his written contract, for the purpose of changing its legal effect and lessening the amount for which he is liable to the defendant, on suggestions and insinuations not founded on any positive facts stated in the bill, or by the introduction of parol evidence, can not be sustained in equity any more than at law.

A contract is never allowed to rest partly in writing and partly in parol. Whenever it is reduced to writing, *that* is considered as the evidence of the agreement, and everything resting in parol becomes thereby extinguished. This is the settled doctrine of the courts of law (1 Johns. 414), and has been fully recognized as the rule in equity. As where an agreement is reduced to writing, all previous negotiations, resting in parol, are extinguished by the written contract, and can not be resorted to, to help out or explain its meaning. 1 Johns. Ch. 282, 429. On this point Chancellor Kent speaks in the most positive terms, and with great energy. "There is nothing (says he) more dangerous than to impair the force and effect of solemn contracts in writing, by careless, idle, and perhaps unmeaning conversation; and so far as such testimony is in contradiction to the note itself, *it is utterly inadmissible.*" 2 Johns. Ch. 557.

There are no *facts* set out in this bill, which go to show that there was any *mistake* in the terms and conditions of this note. Loose conversations had between the parties, *previous* to the execution of the instrument, can not be received as evidence to do away its legal effect or change the liability of the complainant; and a mistake as to the *law* is not relieved against by a court of chancery. Every man is to be charged at his peril with a knowledge of the law. 2 Johns. Ch. 60. And besides, there is no positive allegation in the bill, that the defendant, *at the time* this note was executed agreed to take the notes of the Miami Exporting Company. The fair and reasonable presumption is, that he did not, or it would have been so expressed in the contract. And there is no *act of fraud* alleged which will warrant the court now to interfere with the case, after a verdict and judgment \*at [527 law. In fact, the general principles which have governed the jurisdiction of courts of equity, and which have long been recognized and established, in both the English and American chancery, are

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opposed to the assumption of jurisdiction in a case like the present, for *any* purpose of relief. No case has been made out in the *first part* of the complainant's bill, which shows that his remedy and defense to this note was not as plain, adequate, and complete at law as in equity.

It is the settled doctrine of the English chancery, not to relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question pending the suit, or it would not have been received as a defense. 3 Atk. 223. The same doctrine has been sanctioned, with strong expressions of approbation, by an eminent and distinguished chancellor of the Irish court. 1 Schoale & Lefroy, 201. And also by Chancellor Kent, and other enlightened lawyers of New York. 1 Johns. Cas. 491, 501; 1 Johns. Ch. 49, 91.

It is also a settled rule in chancery, and one which has long been adhered to with scrupulous regard and fidelity, that a party will not be aided in a court of equity, after a trial at law, unless he can impeach the verdict or report by facts, or on grounds of which he could not have availed himself, or was prevented doing it by fraud or accident, or the act of the opposite party unmixed with any negligence or fault on his part. 7 Cranch, 336; 3 Johns. Ch. 356.

The defendant, therefore, can see no reason why a party in a court of equity, in a case where the same rules of evidence apply as at law, should be permitted by any parol explanations to change the legal effect of a written instrument, when that legal effect has been found and adjudged, and the rights and liabilities of the parties ascertained and determined by a court of competent jurisdiction, and that, too, after solemn argument before all the judges in bank.

The *second part* of the bill, relating to the title to the quarter section of land purchased by the complainant of the defendant, is too defective, in *substance*, to entitle him to a discovery, answer, or relief, in a court of equity.

528] \*It does not appear to whom John C. Symmes conveyed the said quarter section, in 1795; nor that the defendant's title is traced through said conveyance.

The nature, terms, and conditions of the contract, by which John C. Symmes sold a large quantity of land, in 1787, to Benjamin Stites, is not stated; nor is it anywhere alleged that said contract

is still in force; nor is the contract, and the certificate of the entry or location of the 10,000 acres of land, set out or made part of the bill, or anything averred, by which the court can discover that there is any evidence, John C. Symmes could have no authority to convey said land, except from said Stites.

It does not appear, by anything stated or alleged in the bill, that the defendant's title is traced through said Stites; nor is there any facts made out by the complainant which would lead even to a *suspicion*, that there is *any* defect of title to the said quarter section; but, on the contrary, loose insinuations and improper inferences have been resorted to, from which the court are called upon to open up a judgment at law, rescind a solemn contract in writing, made in good faith by the parties, or otherwise compel the defendant to perfect a title, which, for aught that appears in the bill, is in no way defective!

It does not appear that the complainant has *not* the defendant's deed for this quarter section, with the usual covenants of warranty; but from the *general* tenor of the bill, it is believed the court would be justified in inferring that he *had*; and in such case, his remedy would be plain, adequate, and complete, at *law*; the complainant being in possession of the *locus in quo*, and the defendant not being in insolvent circumstances, and abundantly able to respond the amount of damages which might be recovered against him, in an action at law, on his covenants of warranty in the deed. 18 R. Stat. 70. And where a cause depends on the solution of a legal question, the proper *forum* for the determination of that question is a court of law, and equity will not interfere. 2 Johns. Ch. 376, 391.

There is also another serious objection to relief in the case, which is manifest on the bill itself. It is an attempt to break down the lines of distinction which have long marked the separate boundaries of chancery and law jurisdiction; \*and if sustained, would [529] tend to encourage negligence, protract litigation, and draw within the cognizance of a court of equity the general review of trials at law. 3 Johns. Ch. 357.

But the determination of this case, even if a defective title had been fully made out in the bill, and we had no statute remedy on the covenants of general warranty in a deed before eviction, must rest on the general principles of equity jurisdiction, and the demurrer will be sustained.

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A purchaser of land who is in possession, can not have relief in equity, *on the mere ground of defect of title*, without a previous eviction. If there be *fraud* in the case, the purchaser must resort to his covenants, in an *action at law*. 1 Johns. Ch. 213; 2 Johns. Ch. 519; 3 Vesey, 235.

ESTE and HAMMOND, for complainant:

The defendant predicates his demurrer, as to the first point in the bill, principally upon the decision of the Supreme Court in the action at law in this case. That decision rejected the words "in current bank notes of the city of Cincinnati," as having no effect in the contract. The note would have been a good note, and the decision would have been just what it was, had these words been omitted.

As we understand that decision, the court consider these terms as only specifying what kind of money was to be received in payment, and that the obligor must pay in that kind of money at or before the day, or it stands as if it formed no part of the contract. The object of the bill is to set up an interpretation of the parties different from this, founded on the original understanding, and on a subsequent practical interpretation.

It is objected that this is to vary a written agreement by parol evidence; but we reply that this is not correct. The terms used are ambiguous. They were inserted in the contract for some practical purpose, and the evidence is offered to show what that purpose was. It runs with, and does not contradict the note or written agreement.

It was decided that at law the obligor must have tendered current bank notes within the terms of the contract, to avail himself 530] of the advantage contemplated by inserting \*them in the contract. The bill shows that this was not done, because the holder of the note gave notice he would not receive such notes.

Another ground of relief set up in the bill is, that the maker of the note was mistaken as to its legal effect. The defendant replies, that a mistake in law is not to be relieved against in equity. A doctrine like this has prevailed; but is founded in no just principle, and has been recently overruled by the Supreme Court of the United States. We refer to the case of *Hunt v. Rousmanier's executors*, 8 Wheat. 174, which is full authority for all the grounds taken upon the first point of this bill. The argument of Mr.

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Wheaton is one of the most able and lucid ever addressed to a court of justice, and is substantially adopted by the court in the opinion delivered.

The grounds upon which it is attempted to sustain the objections to the second point in the bill are little else than captious cavils. All titles must be derived from J. C. Symmes within the Miami Purchase. The bill charges that the original deed from him to the land in question is defective. If this be the fact, there is no legal title.

The bill refers to other papers of record as evidencing incumbrances; it does not profess to state the extent of them; their existence is sufficient to put him upon inquiry. But the defendant objects that complainant may have remedy at law. This is not correct; he is entitled to have his contract perfected or rescinded, and is not to be turned round to squabble before a jury for damages, which, whether obtained or not, leaves the matter of title where it was found. Besides, if he were to recover at law for the defect of title, the defendant might go into equity to have the proceedings stayed, that he might remove the incumbrances or defects of title, and execute the contract. Surely the court will not send the complainant from equity to law, that when he has succeeded there, he may be brought to equity upon the same grounds, except that the relative character of defendant and complainant would be changed. 1 Atk. 384; 2 Id. 630; 3 Id. 304; 3 P. Wms. 306.

Opinion of the court, by Judge HITCHCOCK:

The prayer of the bill in this case is to enjoin a judgment at law, rendered at the last term of this court, and also to \*procure [531] a rescission of a contract. Two reasons are assigned why the court should interfere: 1. A mistake in the terms of the note upon which the judgment was rendered. 2. A doubt as to the title to the land conveyed by the defendant to the complainant, which land was the consideration of the note.

The facts set forth in the bill are admitted by the demurrer, and the question to be determined is, whether there is sufficient matter to justify the interference of a court of chancery.

It is the peculiar province of chancery to relieve against fraud, mistake, or accident. But how far parol testimony can be admitted to prove mistakes in a written instrument, has been matter of much altercation and doubt. Mistakes in matter of fact, it



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seems may be rectified, and the opinion of the court in the case of *Hunt v. Rousmanier's administrators*, 8 Wheat. 174, goes far to establish the doctrine that where the parties, through a mistake and ignorance of the law, execute a writing which does not carry into effect their contract and intention, that the true contract and intention may be enforced in chancery.

In the case before the court the alleged mistake consists in this: the purchase money, which was the consideration for which the note was given, was to have been paid in *notes of the Miami Exporting Company*. The note was to have been made thus payable; whereas, in fact it was made payable in "*current bank notes of the city of Cincinnati*." The complainant understood that he was to pay in the numerical value of the notes. If, in consequence of this mistake, the complainant has sustained an injury, he ought to be relieved.

It is an invariable rule in chancery that he who seeks equity must do equity. Suppose the notes referred to had been drawn payable in the notes of the Miami Exporting Company, and there had been no mistake, what must the complainant have done to have defended himself at law, and to have secured to himself the privilege of paying in the notes of that bank? He must have tendered the notes on the day, and ought also to have brought them into court. The mistake, however, having happened, which rendered it proper that he should come into a court of chancery, 532] what ought he to do here? The contract was that he was to pay, on a particular day, the sum named in the obligation, in a particular description of bank notes. He ought, then, to show that he tendered these notes at the time specified, and he ought to bring them into court that the opposite party may receive them. The notes, however, are not brought into court, nor is there any pretense that they have been tendered. The complainant, then, does not appear to be ready to do that equity which he requires of the defendant, and on this ground is not entitled to the relief prayed for. The circumstance that the defendant, some time before the promissory note fell due, stated that he would not receive those *bank notes* in payment, can not excuse the complainant in not making the tender.

It is claimed that an account should be taken of these notes, and that the complainant should only be made liable for their specie value. This can not be done; bank notes are considered as money.

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Stump v. Rogers and others.

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The holder has a right to look to the banks which issue them for their *numerical value in specie*, and can not be compelled to take for them a value fixed by *shavers* and *brokers*. The ability or inability of the bank to pay ought not to be taken into consideration.

The doubt as to the title to the land grows principally out of an old contract entered into between Symmes and Stites in the year 1787. This contract was made before Symmes had any interest in the land. His contract for the purchase from the United States was made in the year 1788, and he obtained his patent in 1794. The deed from Symmes for the quarter section in controversy was executed in 1795. It is objected to this deed that it was neither acknowledged nor proven. However, when it has been accompanied by a possession of twenty-nine years, it is pretty good evidence of title. Neither this defect in the deed, after so long a continuance of possession under it, nor the bare *possibility* that there may be an attempt to enforce the contract at some future period, which contract was made almost forty years since, is sufficient to justify the court either in enjoining the judgment at law or rescinding the contract.

The demurrer is therefore sustained, the injunction dissolved, and the bill dismissed, with costs.

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\*WILLIAM STUMP v. J. ROGERS, M. ROGERS, W. ROGERS, [533  
AND THE BANK OF CHILLICOTHE.

*Remedy of Security in Equity.*

Security may proceed against principal in equity to have his estate subjected to the payment of the debt, without making payment himself before commencing his suit.

THIS was a bill in chancery, adjourned here from Pickaway county. The facts, material to be reported, were as follows: In the year 1816 the complainant and others indorsed a note for the defendant, W. Rogers, which was discounted by the Bank of Chillicothe. It was not paid, and separate suits were brought, and

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Mills v. Noles.

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separate judgments rendered. Part of the amount was made upon execution against W. Rogers, and part against the other indorsers. Nothing was paid by the complainant upon the judgment against him. The bill was brought to subject certain real estate, charged to have been fraudulently transferred to the defendant, Jonathan Rogers, through the interposition of a court of chancery, but which was justly liable to the payment of the debt as the property of William Rogers. The answers denied the fraud, and the question of fact in relation to it was earnestly litigated.

IRWIN, for the complainant.

SCOTT, for the defendants.

The court decided the question of fraud in favor of the complainant. Whether the complainant could come into a court of equity to charge the principal debtor's estate with the debt, not having acquired at law a right to sue the principal by payment of the money, was a question which arose in the consideration of the cause, and the court held that a security might ask a court of chancery to aid in subjecting the estate of the principal to the payment of the debt, without first advancing or paying the money, as he must do before he could sue an action at law.

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\*ROSWELL MILLS v. JACOB NOLES.

*Facts tried by Court—Appeal.*

The court of common pleas can not try the facts of a cause without the consent of both parties.

Appeal lies from a judgment in the common pleas, though the trial was irregular.

THE question in this case arose upon a motion to quash an appeal from the court of common pleas of Perry county to the Supreme Court. It came up on a bill of exceptions, and was referred for decision here.

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 Greene v. Surviving Partners of Greene.
 

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Before the meeting of the court of common pleas the plaintiff notified the defendant that he did not propose to try the cause, but meant to suffer a nonsuit and appeal. Accordingly, upon calling the cause in the common pleas, the plaintiff was nonsuit. Afterward a suggestion being started whether an appeal would lie from a voluntary nonsuit, the plaintiff, during the same term, moved to set the nonsuit aside, which was done. He then proposed to submit the cause to the court, to which the defendant objected, but the court overruled his objection, and proceeded to hear the cause, the plaintiff offering no proof. Judgment was given for the defendant, from which the plaintiff appealed.

IRWIN, in support of the motion to quash.

By the COURT:

The court of common pleas ought not to have taken upon themselves the trial of the facts of the cause upon submission without the assent of the defendant. It is only where both parties consent that the court can try the cause. But this mistake can not be corrected upon a motion to quash. Here is a formal decision of the cause, and a judgment rendered, from which an appeal is regularly taken. It can not be quashed.

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\*JANE GREENE v. SURVIVING PARTNERS OF WILLIAM [535  
GREENE & Co.

*Dower.*

The widow of a deceased partner is not entitled to dower of the partnership lands, purchased and paid for with partnership funds, under articles stipulating that the partnership property should be sold for the payment of debts.

THIS was a bill in chancery brought by the complainant, the widow of William Greene, deceased, to recover dower in certain lots in the city of Cincinnati. The facts in the case were agreed by the parties to be as follows

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*Greene v. Surviving Partners of Greene.*

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On the 25th of May, 1818, William Greene, deceased, the husband of the complainant, entered into partnership with the defendants to erect and carry on a brass and iron foundry in Cincinnati.

The articles of copartnership stipulated, among other things, that on the dissolution of the partnership the property of the concern should all be sold, and the proceeds applied first to the payment of the debts due from the partnership.

After the formation of the company, the premises of which dower is prayed were purchased by them as a site for their establishment, and buildings were erected necessary for carrying on the business, which were used and occupied exclusively for the purposes of the partnership, and were necessary for that use. The title was taken in the joint names of all the partners, and with the buildings constituted a large portion of the capital invested. No part of the purchase money was paid by Greene, who died insolvent, and heavily indebted to the partnership. Before the death of Greene the partnership became insolvent, and judgments were, in his lifetime, recovered against the company for debts incurred in purchasing and improving the premises, upon which executions had issued, and were levied on the premises, which had been appraised, under the execution laws of the state, at about one-fourth of the amount of the judgments.

There was no other property of the concern, real or personal, out of which the judgments could be satisfied. William Greene, the deceased, was entitled to one-fifth of the profits, and liable for one-fifth of the debts of the concern.

The complainant's marriage with William Greene was admitted, and his seizin during the coverture as one of the partners of the company.

536] \*The cause was adjourned to this court by the supreme court of Hamilton county.

KIMBALL, for complainant:

By the laws of this state the widow of any person dying shall be endowed of one full and equal third part of all the lands, tenements, and real estate of which her husband was seized, as an estate of inheritance at any time during coverture.

The only question is whether William Greene was seized during coverture of such an estate of inheritance as is contemplated by the laws above referred to.

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Greene v. Surviving Partners of Greene.

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Property purchased and used for the purpose of carrying on a partnership concern is not changed in its nature, unless the articles of agreement expressly stipulate that it shall be converted; but the real shall descend as real, and the personal as personal. *Thornton v. Dixon*, 3 Ves. Jr. 199; *Bell v. Phyn*, 7 Ves. Jr. 57. In the first of these cases the property was not only used for the express purposes of the partnership, but the deed contained a covenant from the general partners to stand seized of the land in trust for the copartnership, and this article was not sufficient to alter the nature of the property, and the seizin was sufficient to entitle the widow to dower. The case of *Bailman v. Shoro*, 9 Ves. Jr. 508, supports the same doctrine, as also *Watson on Partnership*, 60.

The analogy of the cases cited to the one for decision leads us to the conclusion that the husband of the petitioner was seized of such an estate as entitles her to dower by the laws of this state.

By the marriage contract the wife's right to dower is absolutely vested in her *eo instanti* with the celebration of the contract, in all the lands, tenements, and real estate her husband may at that time, or at any time during coverture, be possessed of as an estate of inheritance.

It is not in the power of the husband by any act of his own to divest the wife of her right to dower. But if property used for the purpose of a partnership is by such use converted into personalty, it would be in the power of the husband by this means to deprive the wife of dower.

\*The law regards these three things, "Life, Liberty, and [537 Dower."

It is consonant with the laws of God and man that the husband should provide for the wife, not only during his life but after his death. And this is reasonable, as during coverture she can acquire no property of her own, and by the marriage he has the control of at least her personal property.

All men are supposed to regard their own interest with an equal solicitude as that of others. The conclusion follows that the skill and labor of William Greene was allowed to be an adequate consideration for his proportional share of the copartnership. Suppose the said Greene had advanced all the money, and the remaining partners had contributed their quota in skill, labor, and

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Greene v. Surviving Partners of Greene.

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materials, would this circumstance have strengthened his widow's right to dower? The idea is preposterous.

The counsel for the defendant has cited cases in New York and Massachusetts reports, to establish the point that a widow is not dowable of an estate of which the husband was seized but for an instant. Those are the only cases that I can find in the books where a widow is not dowable of an estate of which the husband was seized for his own benefit, though it were but an instant. Upon an examination of those cases I find that all the decisions referred to in theirs, come decided upon an instantaneous seizin, either by his own wrongful act, as where a joint tenant attempts to convey a fee simple, or as a *cestui que trust*, or as a mere conduit pipe for the conveyance of the land to a third person, and not one case is referred to where the wife was not dowable of an estate of an instantaneous seizin for his own beneficial interest. In *Croke Eliz. 503*, if the husband is seized but for a single instant in his own right, the wife shall have dower.

N. WRIGHT, for the defendant :

The case presents the inquiry whether real estate, purchased and occupied by partners solely for the purposes of the partnership, under articles stipulating for the sale of all the partnership property for the payment of debts, is subject to dower of the wife 538] of a partner who contributed nothing \*to the purchase, died indebted to the firm, and the firm insolvent.

1. It is contended for the defendants that the lien of partners on the partnership effects for the payment of the joint debts, and the balance of account between them, extends to real estate purchased and used solely for the purposes of the partnership; or, in other words, that such real estate, however the legal title may stand, is a trust in equity for the several parties according to their actual interest in the concern.

2. That the agreement to sell creates a trust, and operates in equity to convert the land into money for the purposes of the agreement.

3. That on either ground the lien or trust attaching with the acquisition of the estate by the husband, is paramount to dower, and there being no residuary interest, will entirely exclude it.

I. It is a familiar principle of law, that partners have a lien on the joint effects for the payment of the joint debts, and the balance

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Greene v. Surviving Partners of Greene.

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of account between them. The effect of this lien is such that neither the operation of law nor the individual act of any partner, except when he exercises an implied authority from his copartners, can transfer any greater interest in the joint effects than the balance due him from the concern. It is often called in question in cases of bankruptcy, death, execution, and individual assignment, and necessarily excludes every other claim depending on the separate rights or liabilities of a partner. Wats. Part. 72, 103, 229; 1 Ves. 497; 4 Johns. Ch. 522; 2 Johns. Ch. 548; 15 Johns. 159; 4 Ves. Jr. 396; 2 Ves. Jr. 258; 5 Cranch, 301.

It is created by the very contract of partnership, and extends to everything coming in lien during its continuance. *West v. Skip*, 1 Ves. 242.

Though technically termed a lien, it is nothing more than the right of the partner to his own property; and the whole system of legal rules on this subject will be found, on careful examination, to result from the simple principle that every partner has a certain interest in the joint stock, of which he can not be divested without his assent, either express or implied; that his interest is the exact amount he has invested, after deducting the losses or [539] adding the profits. To ascertain that interest the debts must first be paid, then the accounts balanced between the partners according to their several advances. Such balance is all that the partner can treat as his own, or that can be subjected to individual debts. Any other rule would have the effect to appropriate the property of one man to pay the debts of another, and besides its injustice would occasion such hazard in that kind of associations as would discourage and destroy them. The principle embraces all the joint effects as an indivisible community of property; there can be no individual interest in any item, because they are all necessarily blended in interest by the mode in which they are acquired, and in account, by the manner of conducting the business. No partner can say this or that article is his own, for his copartners have contributed to purchase it, and his assent to the union of interest is declared by the act of blending it with the joint accounts.

This explanation of the partnership lien shows its application to real estate held as partnership property. The real interest of a partner in such estate can be estimated in no other way but by ascertaining the balance of account in his favor. The land is



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*Greene v. Surviving Partners of Greene.*

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purchased with partnership funds, improvements are made, fixtures are attached and severed as convenience may require, and it becomes utterly impossible to separate it from the community of interest. It can not be ascertained what each partner has paid on the land till the whole accounts are settled. It would surely be unjust that a partner, holding legal title as tenant in common of such property, who had advanced nothing to the concern, should be able to sell an equal interest in the freehold, without power in his copartners to prevent it; or that his heirs should inherit, without being accountable, especially to the other members of the firm; and yet such would be the effect of a contrary doctrine.

There are principles closely analagous to that for which we contend, long recognized in equity.

Where one takes the title to land, and another advances the purchase money, there is a resulting trust for the latter. Where a part only is advanced by another, the trust is in proportion to 540] the money advanced, and this trust may exist \*among tenants in common in favor of each other, and following the same rules of proportion. *Sug. Vend.* 406, 409, 414; *Bottsford v. Burr*, 2 *Johns. Ch.* 410; *Way v. Steele*, 2 *Ves. & Beam*, 388; 1 *Dal.* 192. If these principles of resulting trust are recognized, in relation to partnership real estate, the existence of the lien must follow as an inevitable consequence. There will be a trust in proportion to the interest of each in the concern. 1 *Vern.* 33; *Lake v. Craddock*, 3 *P. Wms.* 158.

In the English books there are many cases, in which the doctrine contended for seems to be clearly recognized; and, although they are generally cases arising between the real and personal representatives, not involving the rights of partners between each other, or of creditors, and so not direct adjudications on the question, yet if carefully examined, will be found to furnish great weight of authority. *Thornton v. Dixon*, 3 *Bro. Ch. C.* 199; *Smith v. Smith*, 5 *Ves. Jr.* 189; *Lyster v. Dollard*, 1 *Ves. Jr.* 431; *Buckridge v. Ingham*, 2 *Ves. Jr.* 661; *Bell v. Phyn*, 7 *Ves. Jr.* 454; *Balmain v. Shore*, 9 *Ves. Jr.* 500; *Ripley v. Waterworth*, 7 *Ves. Jr.* 425; *Foster v. Hale*, 3 *Ves. Jr.* 696; 5 *Ves. Jr.* 308; *Ford v. Heron*, 4 *Munf.* 316.

In the case of *Smith v. Smith*, which was a claim for dower, the remarks of the chancellor are directly in point; and many of the others allude to the doctrine as not to be questioned. It is

even said to be now the prevailing opinion in England, that real estate thus held, will pass to the administrator as personalty. Noy's Maxims, in notes. In this country, where land is subject to traffic and merchandise, and treated as personalty in ordinary transactions, there are much stronger reasons for adopting the rule.

II. The agreement in the articles of copartnership, that the property should be sold for the payment of debts, is a point still clearer for the defense. The property was purchased on the faith of this agreement, and in equity is bound to answer the purposes of it. It is the ordinary case of land agreed to be turned into money, and in this court will be treated as such. It is unnecessary to refer to the reasoning, or the numerous cases on this subject. The principle is fully recognized in *Craig v. Leslie*, 3 Wheat. 563. A court of equity would execute this agreement on the application of any one of the partners, and the husband's estate was bound by it from the purchase. The object of such a stipulation was so to pledge the estate, that it could never be converted to a different purpose; those who advanced their money for the purchase, relied on that security; and a court of equity must give them the benefit of it, to the exclusion of every *mesne* incumbrance. The effect of such an agreement between partners has often been recognized, and it would seem even to operate to make the real estate distributable after death as personalty. *Wats. Part. 60*; *Thornton v. Dixon*; *Balmain v. Shore*; *Ripley v. Waterworth*, ante.

III. The rights of the other partners, whether founded on the general lien, or the special agreement, are equally paramount to dower. The widow can have dower of no greater or better estate than the husband held at some period during the coverture, and her right attaches subject to all incumbrances existing at the time of the marriage, or attaching with the purchase by the husband. The wife takes her estate of the husband, her right springs from him, it is but a portion of his estate; and the stream can not rise higher than the fountain, the part can not be greater than the whole. The wife can be endowed only of the real beneficial interest of the husband, and she is liable to be defeated by every subsisting claim, which might have defeated the husband at the period of his best estate. As in cases of a trust estate, joint tenancy (at common law), eviction by title paramount, entry for condition.

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broken, forfeiture by tenant in tail for alienation in fee. Co. Lit. 21, 217, 241.

So of an estate limited to such uses as the husband shall appoint, and in the meantime to himself, by which he is invested with the fee; yet an appointment made, the dower falls. Co. Lit. 217; *Maundrill v. Maundrill*, 10 Ves. Jr. 250.

So of exchange, seizin for an instant only, etc., so of agreement to convey, executed before dower attaches. 2 Ves. 631; 2 Powell Con. 57; *Hardin*, 288; 2 Bac. 387.

So of lands purchased during coverture, and at the same time mortgaged for the purchase money. 15 Johns. 461; 4 Mass. 566.

So of the vendor's lien for the purchase money. Sug. Vend. 364; 6 Ves. Jr. 95; 1 Johns. Ch. 310.

542] \*So undoubtedly where lands descend to the husband and afterward are sold by administrators to pay the debts of the ancestor.

All these examples show that any incumbrance, or condition, attaching with the acquisition of the estate, is paramount to dower.

In the present case, the incumbrance formed a part of the transaction by which the estate was acquired, was a part of the consideration of the purchase; it attached with the acquisition, is of course paramount to dower, and exhausts the whole estate. The dower must, therefore, fall entirely.

Opinion of the court, by Judge SHERMAN:

This case depends upon the question whether the widow of a deceased partner is entitled to dower in lands purchased and paid for out of the partnership fund, under articles stipulating for the sale of the whole partnership property for the payment of debts, and used exclusively in carrying on their trade, the partnership being insolvent, and the deceased partner greatly in debt to the firm.

The widow, by our statute, is entitled to dower of all lands of which the husband was seized, as an estate of inheritance at any time during coverture.

Her estate is but a part of his, is derived from him, and must be subject to all incumbrances existing against it at the time of the marriage, or the acquisition by the husband; the husband can, by no act of his, destroy or affect her right of dower where it has

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once attached, but it only attaches where he has a real beneficial interest in the lands of which dower is claimed. Upon this principle it has been held, that the wife of a mere trustee was not entitled to dower in the trust estate, although the husband was at law seized of an estate of inheritance.

A mere technical seizin of the husband, without any beneficial interest in the estate, will not entitle the wife to dower, as where lands descend to the husband, and are afterward, by virtue of the provisions of the statute, sold by the administrator of the ancestor, to pay debts due by such estate; here the husband is seized of a legal estate in inheritance, cast on him by operation of laws, but subject to the payment of the debts of his ancestor, and its being sold \*for that purpose, shows that the husband never had a beneficial interest therein. [543]

So where the husband is only seized for an instant. Co. Lit. 31. Where lands are mortgaged to the husband, and the mortgage money is afterward paid, the husband was seized during coverture of a legal estate of inheritance, and yet the wife can not have dower in the lands so mortgaged.

Also, where lands are purchased by the husband, and mortgaged at the same time to the vendor for the purchase money, it has been held that the mortgage is paramount to the claim of dower. 15 Johns. 461; Mass. 566.

In this case the property was purchased, and the deed taken in the names of the partners, but it was bought with partnership funds, and for partnership uses, and was therefore subject to the condition expressed in the articles of partnership, that at its termination all the property should be sold for the payment of the debts.

The interest which each partner had in the property so purchased, was, at the moment of the acquisition, subject to this condition of the agreement.

This agreement in equity converts the land into personal property, as between the partners and their creditors, and subjects it to all the liabilities of their joint stock in trade. It shows the original understanding of the parties, that it is to be treated as partnership effects, and not as an estate in lands held in common.

In *Thornton v. Dixon*, 3 Bro. Ch. Cas. 199, Lord Thurlow said, "that had the agreement been that the lands should be sold, it would have converted them into personalty." In this case the in-

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terest of the creditors was no way involved; it was a question between the real and personal representative of a deceased partner, and it was held, that as the articles of partnership did not provide that the land held by the partnership should be sold, or otherwise manifest an intention of considering it as part of the effects used in trade that the real representative was entitled thereto. The right of the real representative is made to depend, not on the character of the estate, but the want of any agreement between the partners that it should be sold or otherwise appropriated to the payment of debts.

544] \*In the case of *Smith v. Smith*, 5 Ves. 189, dower was decreed to the widow of a deceased partner of lands purchased in the name of her husband, and paid for out of the partnership funds, on the ground that by the agreement between the partners these lands were to be the husband's, and he made debtor to the partnership for the purchase money, the court observing, that had there been no agreement between the partners, the estate purchased with the partnership funds, though conveyed to one partner, would have been part of the partnership property, and this principle was carried still further in the late case of *Featherstonhaugh v. Fenwick*, 17 Ves. 298, by Lord Eldon, who held that a lease of premises where a partnership trade was carried on, renewed by one partner in his own name, was a trust for the partnership, to be accounted for as joint property, although the lessor refused to execute a lease in which the other partners should be inserted.

The principle has often been recognized that lands bought with partnership funds and applied to partnership uses, are, when there is an agreement that they shall be sold for the payment of debts or other purposes connected with the trade, considered in equity as personal property so far as necessary for any of the purposes of the partnership. It is considered as a trust attaching to the estate, at the time of its acquisition, and which a court of equity is bound to execute as against the partners, or those claiming under them with notice; *Bell v. Phyn*, 7 Ves. 454; *Balmain v. Shore*, 9 Ves. 500; 7 Ves. 425; 1 Ves. Jr. 431; and this is in accordance with the general principle that lands, agreed to be turned into money, or money into lands, shall be considered in equity as that species of property into which they are directed to

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be converted, a rule, as observed by the Supreme Court of the United States, that is universal. *Craig v. Leslie*, 3 Wheat. 543.

In the case at bar, the partners, before the purchase of this land, agree that it shall, at a particular period, be converted into money; this agreement a court of equity would specifically execute, by directing it to be sold, upon the application of either of the partners, on the ground that it was held by the partners in trust, for the purposes mentioned in the articles of partnership, and that each partner was interested \*in having it converted [545 into money for the payment of the debts of the firm. At the moment of the acquisition of this estate each partner acquired, as against the others, an equitable right to have this trust specifically executed according to the terms of their agreement, and each was, under a corresponding obligation to the others to dispose of the land and appropriate the proceeds as originally agreed upon. It was an equitable lien which attached to the estate at the moment of its acquisition, and each partner and all claiming their estate as the heir or widow must take subject thereto, and can have only the interest that the deceased partner had.

It has been too repeatedly determined to be now questioned, that the separate estate of a partner consists of that part of the partnership effects which shall remain after the debts of the partnership and the demands of the partner *qua* partner are satisfied; *Ex parte King*, 17 Ves. 115; *Taylor v. Fields*, 4 Ves. 396; *Nicoll v. Munford*, 4 Johns. Ch. 522; and that interest or surplus only is liable to the separate creditors of each partner claiming either by assignment or under execution. *Church v. Knox*, 2 Day, 514; 6 Mass. 242, 271; 11 Mass. 249, 472; 2 Johns. 280.

The interest which William Greene, the husband of the complainant, had at the moment of his death in the partnership effects, was the surplus after payment of the partnership debts, and the balance due his partners. The case shows that he had never advanced anything; the whole funds, both for the purchase of the lot of which dower is claimed, and for carrying on the business, was advanced by his partners, and at the time of his decease the partnership was insolvent. If this estate is to be considered in equity as personal property, and the court have no hesitation in saying it must be so considered as between the partners and their creditors, he had no substantial interest at the time of his death which would go to his representatives, or could be taken by his

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separate creditors. If it be considered as real estate, it was acquired subject to a condition or agreement that qualified the estate of the husband, and the wife, when there is an agreement, unless 546] it were executed \*after her right attached, would be bound thereby so as to exclude her right of dower.

The court are satisfied that the husband was at no time during coverture seized of such an estate of inheritance in these lands as is contemplated by the statute giving the widow dower, and that she is, by force of the statute, entitled only to a share of the beneficial interest he had in the lands; and where real estate necessary or convenient for the conducting a trade is purchased by a partnership, and paid for by their joint funds, under an agreement that they shall, at the termination of the partnership, be sold for the payment of debts, and the residue of the partnership effects are insufficient to discharge the debts, that the land so purchased, whether conveyed to one or all of the partners, is not subject to dower of the widow of a deceased partner.

The bill must therefore be dismissed with costs.

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NOTE A.

It was intended to insert here an examination of the cases that relate to the doctrine of sustaining a general count, where there was a special contract proven, but it is omitted in consequence of the reports make a larger volume than was expected.

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